26.2.3. Jackie Jones, an expert in FIDIC type contracts.

27. As directed, the Parties had also lodged a bundle of agreed documents in advance of the hearing, which I had read prior thereto.

28. At the end of the hearing, I asked the parties and their representatives if they were content that they had been heard on all the issues in dispute and had made such submissions as they wished to make. This was confirmed and I declared the hearing closed UNCITRAL Rules Article 31.

29. Subsequent to the Hearing, Post Hearing Briefs (PBHs) were exchanged simultaneously on 12 February 2022, as agreed.

30. Detailed and itemized cost submissions were also submitted simultaneously on 12 February 2022, together with details of the settlement offers made between the Parties.

31. I then rendered this Award on 14 June 2022, terminating the arbitration proceedings according to the UNCITRAL Model Law. I ordered a 14-day grace period for payment of the Award by the unsuccessful Party, after which non-compliance interest will run as Awarded in the operative part of this Award.

THE BACKGROUND TO THE DISPUTE

32. I can now set out the facts in more detail. Where there are disputed facts, I shall indicate the Parties' respective positions. I shall then make the findings necessary to resolve the issues below.

33. The uncontroversial background to their dispute is as follows:

33.1. The Parties entered into a contract (the "Contract") on 1 July 2020 under the laws of Northistan to build an electricity substation in Northistan. The contract was formally titled "Build Contract NISTN/40034/22". The Contract included terms for: the payment of an Advance Payment of N$2,000,000; the payment of 48 monthly interim payment certificates of N$500,000; the provision of design work by the Respondent; the construction of certain works by the Claimant; provisions concerning determinations, variations, the Contractor's entitlement to suspend work, and the Contractor's entitlement to terminate.

33.2. The Respondent paid an advance of N$2,000,000 to the Claimant upon the execution of the contract by the Parties on 1 July 2020. Mobilisation took place between 1 July 2020 and 31 July 2020, and work started on 1 August 2020.

33.3. The Respondent provided design work to the Claimant. These designs were soon changed in ways that affected Tank Room No. 8.

33.4. The Claimant notified the Engineer on 5 October 2020 of what it believed were problems with machinery fitting in Tank Room No. 8.

33.5. On 8 October 2020, the Claimant submitted a Value Engineering Variation request to the Engineer.

33.6. On 10 October 2020, the Engineer replied to the Claimant, saying that the Claimant was not responsible for design work and had to build as designed.

33.7. On 1 November 2020, the Claimant gave instructions to its team to proceed with changes to Tank Room No. 8.

33.8. On 3 November 2020, the Claimant wrote to the Respondent to explain its perspective on what had gone wrong, and to request N$1,000,000 for what it claimed was reimbursement for its costs.

33.9. At some point soon after 3 November 2020, the Respondent relied to the Claimant, stating that the changes were unsolicited, and refusing payment or Variation order.

33.10. The Engineer refused to certify the Value Engineering Valuation at any time.

33.11. Starting on 23 January 2021, and for three further months on the 23rd, the Engineer certified IPCs submitted by the Claimant.

33.12. On or about 28 January 2021, the Respondent failed to pay IPC No. 5, and subsequently failed to pay IPCs Nos. 6, 7 and 8.

33.13. On 25 February 2021, the Claimant gave notice to terminate the Contract.

33.14. On 1 May 2021, the Claimant terminated the contract.

33.15. On 7 June 2021, the Claimant made an offer to the Respondent to settle the dispute for N$3,000,000. The Respondent refused this offer, and threatened to cash the letter of credit.

33.16. 15 June 2021, the Respondent made a without prejudice settlement offer to settle the matter with the Claimant for N$1,000,000. On 16 June 2021, the Claimant rejected this letter.

33.17. On 20 June 2021, the Respondent made another settlement offer for N$1,500,000. On 1 July 2021, the Claimant rejected this offer.

33.18. On 1 July 2020, the Claimant filed a Notice of Arbitration in which the name of the Respondent was written as “Pyrontics Ltd, Northistan” three times, in the carbon-copy recipient list; in the body of the email; and in the table of contact details for the Parties. This was accompanied by an apparent misspelling of the name of the CEO of the Respondent; in the email this individual was identified as “Marco Pyro”, whereas in subsequent correspondence, this individual was identified as “Marco Pryon”.

33.19. As identified at the hearing, machinery would have to pass thorough the mezzanine and stairs and it would be impossible to fit it into the Employer's design.

THE CLAIMS

34. The Claimant seeks the following remedies:

34.1. A declaration that IPCs 5-8 were duly certified and are payable.

34.2. A total of N$2,000,000 for the four unpaid IPCs

34.3. Interest on each IPC from the relevant due date for payment until the date the award is paid.

34.4. N$ 1,000,000 for the costs of the changes made to Tank Room No. 8.

34.5. All costs in the dispute.

34.6. Any other damages the Tribunal sees fit.

35. The Respondent denies that the Claimant is entitled to the relief claim and seeks the following remedies:

35.1. A declaration that the works to Tank Room No. 8 were unsolicited and that no monies are due for these works.

35.2. A declaration that the Advance of N$ 2,000,000 covers the four unpaid IPCs.

35.3. A declaration of no amounts to pay.

36. It is unclear whether the Respondent seeks costs. In a section prior to the section "Prayer for Relief", the Respondent writes, "All claims of the Claimant should be denied and all costs incurred by the Respondent in proceedings should be reimbursed to the Respondent." As written, this does not formally seek costs.

THE ISSUES BETWEEN THE PARTIES

37. The Parties agree on the uncontroversial facts enumerated and described above.

38. However, the Parties are not in agreement on the following facts:

38.1. Whether the Arbitrator has jurisdiction to hear the matter despite apparent flaws in the appointment process.

38.2. Whether the Respondent had the right to withhold payment on the IPCs due to the Claimant's purported breach of contract in undertaking works on Tank Room No. 8.

38.3. Whether it was necessary that works on Tank Room No. 8 needed to be accomplished in October and November 2020, or whether the Claimant had made changes to the work schedule.

38.4. Whether the Engineer responded to the Claimant's 5 October 2020 enquiry, and if so, how.

38.5. Whether the Claimant had given the Employer and Engineer sufficient time to investigate and do a cost analysis in regards to Tank Room No. 8.

38.6. Whether the Engineer paid enough heed to the Claimant's warnings to fulfil its obligations under Sub-Clause 4.4.

38.7. Whether the Advance Payment was consumed by Contractual works benefitting the Respondent or whether the Claimant purchased and appropriated to itself machinery (claimed to be worth N$735,764).

39. As such, the issues between the Parties which fall to me to determine are as follows:

39.1. Whether the Tribunal has jurisdiction to hear the present matter despite the error in the name of the Respondent in the Notice of Arbitration.

39.2. Whether the Tribunal has jurisdiction to hear the present matter despite the Respondent's allegation that the Arbitration Clause requires that a Dispute Adjudication Board be constituted.

39.3. Whether IPCs are due and payable, and if so, whether the Advance Payment is capable according to the terms of the contract of being used to cover such IPCs.

39.4. Whether the Claimant's works regarding Tank Room No. 8 were properly undertaken, and if so, whether and to what extent they were compensable.

PRELIMINARY DETERMINATION OF THE LAW GOVERNING THE ARBITRATION AGREEMENT AND ARBITRATION PROCEDURE

40. I must address what law it is that governs the arbitration agreement and thus the arbitration procedure, as the Parties have not made this clear. Per discussions held at the Preliminary Meeting on 25 July 2021, the parties agreed that there was not conflict as to the validity of the Contract or the Arbitration Agreement.

41. The Arbitration Clause provides, "…*all disputes arising out of or in connection with this Contract shall be finally resolved by binding arbitration on an* ad hoc *basis between the parties to this Contract, in Easthead under UNCITRAL Rules. A sole arbitrator will be appointed by the Easthead Arbitration Institute.*" It was confirmed at the Preliminary meeting held 25 July 2021 that the seat of arbitration was Easthead and that the substantive law of the contract was that of Northistan.

42. It is trite law that the UNCITRAL Model Law (Article 20) and the UNCITRAL Rules (Article 18) use the term "place" to mean what other legal systems call "seat". In the present matter, the Parties have confirmed that the "seat" of the arbitration shall be Easthead. The text of Article 20 makes it clear that the juridical seat of the arbitration is not necessarily where the proceedings physically take place, which is irrelevant to the present matter.

43. Furthermore, it is trite law that the law of the seat applies to the determination of the validity of the parties' agreement to arbitrate and, therefore, the jurisdiction or basis of the entire procedure.

44. UNCITRAL Mode Law, Article 16, and UNCITRAL Rules Article 23, grant the tribunal the competence to rule on its own jurisdiction. This is a natural consequence of the doctrine of separability, also contained in these articles. Article 16 provides, "*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*" The consequence of this is that the law governing the arbitration agreement may be different than the substantive law governing the contract, which in the present case is the law of Northistan.

45. Although the decisions of the courts of England and Wales are not directly applicable to the present matter, they are capable of describing general principles applicable to international arbitration. Furthermore, Article 2A of the UNCITRAL Model Law promotes uniformity of application. In *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638, the Court of Appeal explicated this concept, finding that absent express or implied choice by the parties, the law governing the arbitration agreement was the law with the closest and most real connection to arbitration agreement, which it considered a contractual provision concerned with procedure; the Court of Appeal also considered the law of the seat to be the one most closely associated with procedure, cf. the substantive law of the contract. The Court of Appeal therefore concluded that the law governing the arbitration agreement was the law of the seat.

46. The present matter strongly parallels *Sulamerica*. The Parties are incorporated in Northistan and Southland and the contract was performed in Northistan, and yet they have chosen Easthead, a neutral jurisdiction, as the seat of arbitration. Furthermore, they have chosen the EAI as their appointing authority, creating further procedural ties between the arbitration and Easthead. Finally, the subject matter of the contract was construction, not the law of real property, and thus not subject to the law of real property where that real property is located.

47. It should therefore be concluded that the law governing the arbitration agreement and the arbitration proceedings is the relevant arbitration law of Easthead. Although this statute has not been named to me, I have been told that it incorporates the UNCITRAL Model Law.

48. Pursuant to this conclusion, I find that the competent court described in Article 6 of the UNCITRAL Model Law must be the courts of Easthead.

49. The conclusion that the law of Easthead is the law governing the arbitration clause is bolstered by the citation of *Grantham and Forbes, 1824, ESC1/22/24* by the Respondent in regards to a procedural matter at the hearing held on 13 January 2022; this citation, for this purpose, was not contested by the Claimant.

50. Article 19 of the UNCITRAL Model Law states that, "*the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*." Pursuant to the Arbitration Clause, the Parties have agreed that UNCITRAL Rules shall apply. Furthermore, pursuant to their agreement at the Preliminary Hearing, the Parties have agreed to adopt the IBA Rules of Evidence.

51. Article 1(1) of the UNCITRAL Rules provides for their general applicability. However, the application of the UNCITRAL Rules is the fount upon which the selection by the Parties of the IBA Rules of Evidence is founded, and the application of the IBA Rules of Evidence is therefore subject to the fulfilment of the provisions of the UNCITRAL Rules.

52. The UNCITRAL Rules, Article 1(3) provide, "*These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*"

53. This issue is relevant, if inconsequential, in regards to the New Evidence the Claimant sought to introduce at the hearing on 11 January 2022, the introduction against which the Respondent sought to argue by citing the authority of the Easthead Supreme Court. As described below, the conclusion of the Easthead Supreme Court in *Grantham and Forbes* parallels the requirements of the IBA Rules of Evidence, Article 9(2)(b). *Q.v. sub.*

PRELIMINARY ISSUE ON JURISDICTION REGARDING NAME OF RESPONDENT

54. On 1 July 2021, the Claimant's representative, Chloe Burns, sent to Jean James, Secretariat of the EAI and the representative of Respondent, identified at that time as "Marco Pyro, CEO Pyrontics Ltd" a Notice of Arbitration in which the Respondent was identified as "Pyrontics Ltd, Northistan, Registered Number SL23332, Hertha Ayrton Towers, Southsea, Southland, 25345".

55. In my email on 6 July 2021 to the EAI, I stated that I had been unable to find Pyrontics Ltd in the Southland Companies Register[2], but that I had found Pryontics at the same address, and stated I assumed this was a typographical error. On 12 July 2021, the EAI wrote to me acknowledging the error, stating, "*Thank you for pointing out the error in the Respondent's Company name, we have corrected it for our records.*"

56. On 15 July 2021, in response to my email earlier that day acknowledging my appointment as arbitrator, Marco Pyron wrote to me, opposing counsel, and the Secretariat of the EAI, stating that his lawyer had informed him that the arbitration tribunal had not been properly

[2] In this email, I myself committed a typographical error by referring to this as the "Southhand Companies Register".

constituted due to, *inter alia*, the error in the name. He acknowledged that Jacob Tarens, CEO of the Claimant, had jokingly nicknamed him "Pyro".

57. In this communication Mr Pyron stated that my time had been wasted. I interpreted this as a denial of my appointment.

58. In response, on 15 July 2021, I replied to this email to state that, since I had been appointed as arbitrator, I would deal with this under my authority as given in the rules and the law, giving the Respondent ample opportunity to state any objections to my jurisdiction.

59. It is undisputed that, at the Preliminary Meeting held 25 July 2021, the Respondent objected to the jurisdiction of the Tribunal, *inter alia*, because the Notice of Arbitration was written in the name of Pyrontics Ltd, which was an error and should be Pryontics. I invited the Respondent to give its jurisdictional objection in writing and noted that I would make my decision on it in due course.

60. At the same Preliminary Meeting, counsel for the Claimant expressed that it had been a typographical mistake since, as Mr Pryon had noted in his 15 July 2021 email, Mr Pryron had been referred to as Mr Pyro and that the name had been recorded incorrectly on the Claimant's internal files. Counsel for the Claimant argued that this typographical error was not sufficient to derail the arbitration and noted that the address and registration number for the company had been given correctly in the Notice of Arbitration. Counsel for the Claimant further noted that even if there had been a critical error in the Notice of Arbitration, the Respondent could not rely on an error in the Notice of arbitration to slow down or suspend the arbitration under UNCITRAL Rules, and that it was a matter for the arbitrator to decide his or her jurisdiction.

61. In the Claimant's Particulars of Claim, dated 1 October 2021, the Claimant referred to the Respondent by its proper name, Pryontics Ltd.

62. In the Respondent's Defence and Counterclaim, dated 1 November 2021, the Respondent argued, "*The Claimant's Notice of Arbitration dated 01.07.21 is not a valid Notice of Arbitration in that it fails to include all matters necessary for a valid Notice of Arbitration as required by Article 3 paragraphs 3 to 4 of the UNCITRAL Arbitration Rules, specifically that the NoA was written in the name of Pyrontics Ltd, and not the correct name of Pryontics Ltd. Consequently, the arbitral tribunal has not been correctly constituted and the arbitrator lacks the jurisdiction to proceed in this arbitration.*"

63. In the Claimant's Reply dated 1 December 2021, the Claimant argued, "*To rely on the typographical error in the NoA to insist that the entire arbitration is void, is ludicrous.*"

64. This jurisdictional issue does not appear to have been addressed in the Hearing held in January 2022.

65. As a preliminary determination, the Respondent has complied with the requirements of Article 23(2) of the UNCITRAL Rules by raising its jurisdictional challenge in the Preliminary hearing and Defence and Counterclaim.

66. Article 23(1) of the UNCITRAL Rules provides, "*The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*" This grants me the power to rule on my own jurisdiction in this matter.

67. Article 3(2) provides, "*Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration in received by the respondent.*"

68. Article 3(3) of the UNCITRAL Rules provides, "*The notice of arbitration shall include the following: […] (b) the names and contact details of the parties…*" (emphasis added).

69. The examination of arguments not explicitly argued before a tribunal is undertaken at best sparingly; the parties must be given the opportunity to address such arguments. However, a tribunal that does not consider the law as it exists is, tautologically, lawless. In a recent article regarding English law but expressed to contain principles of universal application, Simon Crookenden QC[3] argues that cases where (a) the mistake was obvious or not such as to cause any reasonable doubt; or (b) where an agency relationship exists (e.g., as between members of a corporate group), rectification of a mistake as to the name of a party is justified.

70. In the present case, both criteria are fulfilled. The mistake in the present case is obvious, as it involves the mere transposition of two letters. Given that the Claimant correctly identified the address, jurisdiction of incorporation, registered number, and address – rendering the error easily discoverable by me – the mistake cannot cause any reasonable doubt. Furthermore, it is clear that Mr Pryon had, with whatever disdain, clearly acceded the role of agent for the Respondent under this nickname, such that the email address identification by the Claimant's email client rendered him by this nickname automatically; its use as established by the Parties' earlier relationship was not improper.

71. Although Article 3(3) states that the "*name*" of the Respondent must be provided, this word must be read together with Article 3(2); there is no dispute that the Respondent received this Notice of Arbitration on 1 July 2021. The purpose of Article 3(3) is to ensure certainty in arbitral proceedings, a purpose accomplished by the Claimant's Notice of Arbitration. As the purpose of Article 3 has been fulfilled, this jurisdictional challenge must be dismissed.

72. Finally, Article 3(5) of the UNCITRAL Rules provides, "*The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.*" The Rules not explain whether such hindrance be legal or factual in nature.

73. It is of considerable concern that the representative of the Respondent took it upon himself to email me and the other concerned Parties on 15 July 2021 to deny my jurisdiction to hear this dispute; such behavior violates both the letter and the spirit of Article 3(5), which is relevant to costs determination.

[3] Simon Crookenden, "Correction of the Name of a Party to an Arbitration" (2009) 25(2) Arbitration International 207

PRELIMINARY ISSUE ON JURISDICTION REGARDING ARBITRATION CLAUSE

74. The Parties have provided me with the full text of the Arbitration Clause, which reads in relevant part:

    21.1 If the Parties agree to constitute a Dispute Board, and the Dispute Board fails to render a decision within 100 days of the constitution of the Dispute Board, either Party may initiate arbitration.

    21.2 Provided that no Dispute Board has been constituted, or that the Dispute Board has failed to render its decision within 100 days of constitution, all disputes arising out of or in connection with this Contract shall be finally resolved by binding arbitration on an ad hoc basis between the Parties to this contract, in Easthead under the UNCITRAL Arbitration Rules.

75. The Respondent argues this means that the parties agreeing to a Dispute Board is a prerequisite to arbitration. The Claimant underlines the start of sub-clause 21.2, which states, "provided that no Dispute board has been constituted" to show that the Arbitration Clause envisages that the Parties have the option, but not the obligation to constitute a dispute board in advance of an arbitration.

76. A condition precedent is an event which must occur, unless its non-occurrence is excused, before performance under a contract becomes due, i.e., before any contractual duty arises. For a tribunal to determine that it lacks jurisdiction in the arbitration due to failure of a condition precedent, it must be clear from the wording of the arbitration agreement that the pre-conditions are not merely permissive or non-mandatory.

77. The determination of this issue turns on linguistic analysis, and the analysis put forward by the Claimant is persuasive. The words "*Provided that no Dispute Board has been constituted…*" indicates that the non-constitution of a dispute board allows a party to bring arbitration; this implies that the constitution of a dispute board is permissive.

78. It is in this light that Clause 21.1 must be read. "*If the Parties agree to constitute a Dispute board…either Party may initiate arbitration,*" describes one route to arbitration. There is no basis for reading in the words, "*If <u>and only if</u> the Parties agree to constitute a Dispute Board...*" The maxim of interpretation, "*expressio unius, exclusio alterius*" simply does not apply in the present case, as not only "one" has been expressed.

79. The alternative suggested by the Respondent leads to absurdity; if agreement, at a Party's discretion (as indicated by the word "*if*"), to constitute a Dispute Board, were a prerequisite to bringing arbitration, a Party would be able to avoid the consequences of non-performance of its contract simply by refusing to agree to constitute a Dispute Board.

80. This jurisdictional challenge must therefore be dismissed.

81. Given the obvious consequence of the words, "*Provided that no Dispute Board has been constituted...*" and the absurdity of the interpretation put forward by the Respondent, it

cannot automatically be concluded that this jurisdictional challenge was brought in good faith. This will be examined when costs are considered.

EVIDENTIAL ISSUE CONCERNING ADMISSIBILITY OF DOCUMENT DISCOVERED BY CLAIMANT

82. On the second day of the hearing, 11 January 2022, the Claimant asked to enter into evidence a document it had discovered on a flash drive that the Respondent had given it on which to save the hearing bundle. The Claimant stated the document had been produced by the Respondent's lawyer discussing whether both the Advance and the IPCs could be claimed. I stopped the Parties at this point and asked that no further information be disclosed about the document. I instructed the Parties to make their submissions on the admission of this document into evidence by 9 AM the next morning, 12 January 2022; I limited written submissions to 1,000 words and heard oral arguments between 9 and 10 AM that day.

83. The Claimant's position was that the document was evidence probative of the Respondent's bad faith in claiming that the Advance could be set off against the IPCs. The Claimant quoted the IBA Rules regarding admissibility of probative evidence.

84. The Respondent argued, firstly, that the document was protected by legal privilege under the Easthead Supreme Court decision *Grantham and Forbes, 1824, ESC1/22/24;* and secondly, because the document was obtained without the Respondent's permission. The Claimant argued against this, stating that it had been freely given without supervision or instruction as to its use.

85. Article 9(1) of the IBA Rules of Evidence grants the tribunal the power to "*determine the admissibility, relevance, materiality and weight of evidence.*"

86. However, Article 9(2)(b) provides,

> "*The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document statement, oral testimony or inspection, in whole or in part, for any of the following reasons:* […]
>
> > *(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.*

87. Article 9(4) provides,

> *In considering issues of legal impediment or privilege under Article 9(2)(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:*
>
> > *(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;*

[…]

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

88. As the respondent have helpfully cited to me, the Easthead Supreme Court, in *Grantham and Forbes, 1824, ESC1/22/24*, stated, "*the relationship between a lawyer and his client is protected. It is imperative that they are able to speak freely without fear of these words being used in evidence.*"

89. As I have stated above, UNCITRAL Rules Article 1(3) require that they be applied, and thus the IBA Rule of Evidence be applied, unless they are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate.

90. In the present matter, the procedural law of Easthead applies, and in my reading the result in *Grantham and Forbes* expresses a fundamental principle of the procedural law of Easthead, from which the Parties cannot derogate.

91. However, it is clear that the holding in *Grantham and Forbes* and the requirements of the IBA Rules of evidence present no conflict; both reflect the principle privileging the confidentiality of legal communications found throughout the world. Parties to arbitration proceedings must be free to communicate candidly with their legal advisors.

92. It is clear from the present circumstances that the Respondent did not wish to disclose this document to the Claimant, and that such disclosure was inadvertent and unintentional. Prohibiting the admission of this document into evidence would uphold the confidentiality, and thus candour, with which the Respondent and its legal counsel corresponded.

93. The document discovered by the Claimant must therefore be held inadmissible. This tribunal refuses to admit it into evidence.

CONTRACTUAL ISSUE ON THE LIABILITY REGARDING IPCS 5-8 AND THE ADVANCE PAYMENT

Introduction

94. The present case concerns two distinct substantive matters: (1) whether the Respondent owed sums were due on IPCs 5-8, and if so, whether the Respondent is entitled to a declaration that the advance of N$2,000,000 could cover the sums owing; and, (2) whether the Respondent is liable to the Claimant for the sums of money the Claimant expended in works on Tank Room No. 8.

95. These two issues must not be conflated. The issue of the IPCs and the status of the Advance Payment will be addressed in this section. The issue of Tank Room No. 8 will be addressed later in this award.

96. As a roadmap, this section will show that the Respondent owed monies under IPCs 5-8, and was not entitled to withhold payment on them. Because the Respondent improperly withheld payment, the Claimant was entitled to terminate the Contract; the Claimant exercised this validly, and the Respondent has not disputed the validity of the Claimant's termination of the Contract. Although the Advance Payment was issued by the Respondent to the Claimant in the form of a loan, the Advance Payment was not simply a loan to cover the operations of the Claimant, but rather to provide cash-flow during the mobilization of the works, expenditure of which value accretes to the Contract, depleting the value owing on the Advance Payment. Because the Respondent received the benefit of the Advance Payment, the sums advanced under the Advance Payment were accreted to the Contract and thus are not to be repaid. The Respondent is therefore not entitled to a declaration that the Advance Payment covers the four unpaid IPCs.

IPCs 5-8 are Due and Payable

97. Sub-Clause 14.2 of the Contract provides "*The Employer shall pay N$500,000 on or before the 28th day of each calendar month on submission of duly certified IPCs before the 23rd day of that month.*" This creates a payment obligation for the Employer.

98. Sub-Clause 14.4 provides, "*The Contractor will make an application for an Interim Payment Certificate (IPC) on 20th day each month, along with all supporting documents. The Engineer shall determine and certify the IPC on the 23rd day of that month, as long as all conditions have been met. Payment of the IPC will be made by the Employer at the latest on the 28th day of that month.*"

99. The Engineer of Pryontics, Lesley Randal, has stated that she certified IPCs 5-8. In her statement, she wrote, "*[Work on Tank Room No. 8] did delay other scheduled works but they managed to get back on schedule before the IPC [#5] was due…. The Employer was livid [when she told him of the work on Tank Room No. 8] and told me not to certify the IPCs for anything to do with Tank Rooms 5-9. I didn't' certify the Value Engineering Variation retrospectively of course but the works noted in IPC 5 had nothing to do with the Tank Room, were correct, and I duly certified it. Same with the subsequent ones until the Contractor terminated the works.*"

100. The CEO of Pryontics, Marco Pryon, writes, "*I mean, yes, things were tight with the funding being pulled, but we would have found other sources of funding, I didn't think that was a problem No, of course we stopped payment because of the works they did without permission.*"

101. Neither the Respondent nor the Claimant has adduced evidence that the IPCs were improperly claimed or certified. On this point, Jacob Tarens, Managing Director of the Claimant, stated, "*they paid…the first few IPCs, then suddenly bang, they just stopped paying with no reason and no context. No explanation of when payments would start again.*"

102. The Respondent, in its Defence and Counterclaim, admitted, "*The Respondent ceased payment because the Claimant did unsolicited works to, and around, Tank Room 8 and an investigation was ongoing as to whether the works were necessary and how to deal with the*

issue," but has cited no provision in the Contract that would entitle it to withhold payment for the IPCs on this basis or any other. As long as they were properly claimed and certified, the Respondent's financial obligation to pay on them was engaged. Although there was discord between the Parties as to the works on Tank Room No. 8, such does not entitle the Respondent to withhold payment on the IPCs. Indeed, it appears that the emotional reaction of Mr Pryon to issues related to Tank Room No. 8, and possibly the financial difficulties Pryontics was experiencing, induced him first to instruct the Engineer not to certify the IPCs (in breach of her own duties) and then to retaliate by withholding payment. Such provides no grounds upon which to withhold payment on the IPCs.

103. I therefore declare that IPCs 5-8 were duly certified and are payable.

Respondent in Breach due to Non-Payment of IPCs 5-8, Entitling the Claimant to Terminate the Contract

104. Clause 16 of the Contract provides for a mechanism by which the Contractor may suspend work and may terminate the Contract due to non-payment by the Engineer.

105. Clause 16.2 provides:

"*The Contractor shall be entitled to terminate the Contract if: […]*

(c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the due date. […]

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract.

106. Interpreting this, it must be noted that the Contractor was not required to give notice of termination 42 days after expiry of a due date, but rather was entitled to terminate. The Contractor was only required to give notice 14 days before that day, even if the right to terminate would only accrue on that day. There is nothing illegitimate about sending a notice before the right accrued; indeed, to require that the right to terminate accrue before a notice could be sent would defeat the right to terminate itself. "*In any of these events or circumstances*" must therefore be read to include "*In anticipation of any of these events or circumstances*," to give effect to the right to terminate.

107. In its Particulars of Claim, the Claimant writes at [8], "*The project finally fell apart after only 4 months because the Employer failed to pay IPC number 5 on the due date of 28.01.21 and then continued to fail to pay the subsequent IPCs. The Claimant duly gave notice to terminate the contract on 25.02.21 and terminated the contract on 01.05.21 after month 8 and 4 non-payments of the IPCs 5 through 8."*

108. 42 days after 28 January is 11 March 2021. 14 days before 11 March 2021 is 25 February 2021. The Claimant therefore followed the procedure of Clause 16.2 without error.

109. To be sure, the Claimant waited until 1 May 2021 to terminate. There was nothing improper about this; the Claimant had given the Respondent 65 days' notice, which necessarily implies that the Claimant had given the Respondent 14 days' notice.

110. The Respondent has not disputed the validity of the Claimant's termination. The Contract was validly terminated on 1 May 2021.

111. Regarding causation and liability, the relevant right to terminate under Sub-Clause 16.2 is contingent on an unremedied breach by the Employer of its payment obligations. All other events, even those that may or may not give the Employer the right to terminate, are irrelevant and immaterial to a finding of causation and liability.

112. It is clear that the Claimant validly exercised its right to terminate the Contract under Sub-Clause 16.2. That right is created when there has been a breach by the Respondent of its payment obligations. The Respondent did not seek to terminate the contract and has not put forward any argument as to an entitlement to do so. The Respondent has merely accepted the validity of termination pursuant to Sub-Clause 16.2, and thus the Respondent must be taken to have accepted the factual allegations giving rise such a valid termination.[4] The Respondent's statement in its written submissions, "*I would note that the project failed at quite an early state in month 8 of 24 and only very basic building work had been achieved by that time*," has no bearing on the factual question as to whether the Advance Payment had been consumed, nor any bearing on issues of liability, viz., whether it had been validly consumed. The Respondent simply got what it bargained for.

The Nature of an Advance Payment

113. The Claimant argues in its Particulars of claim, "*The payment terms were agreed as an advance of N$2,000,000 for the one-month mobilization, and then 48 x monthly IPCs of N$500,000 to a total of N$26,000,000 over the life of the 4-year project.*" In its Reply the Claimant states, "*The advance was a sum of money for mobilization to start the work…. The Claimant has the right to both the Advance and the IPCs.*" Jacob Tarens, Managing Director of the Claimant, stated in his witness statement, "*This whole thing about the Advance though was really nonsense. Everyone can tell you the Advance is a separate payment for mobilization and non-refundable."*

114. The Respondent argues in its Defence and Counterclaim, "*…the Claimant has no case because…the Advance covers any outstanding IPCs.*" In its written submissions, it claims, "*The advance is specifically described in the contract as being an interest free loan to the Contractor. As such, it is payable if the project fails for any reason.*" However, Jackie Jones, Party Expert for Pryontics (whose testimony will be considered substantively below), states, "*I have done a forensic accounting of the monies in the Advance and have concluded that when the Contractor left the site it took with it machinery of the value N$735,764 that it did not own at the beginning of the project. This would indicate that at least N$735,764 of the*

[4] Lord Atkins, in *Bell v Lever Brothers Ltd* [1931] UKHL 2, writes, "*The contract released is the identical contract in both cases: and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way: or that if he had known the true facts he would not have entered into the bargain.*"

N$1,000,000 was of benefit to the Contractor." These two statements indicate conflicting theories of the nature of the Advance Payment; whereas the Respondent, in the Defence, evinces a theory that the Advance Payment is merely a store of money to be repaid to it, the Party Expert appears to acknowledge that sums spent from the Advance Payment to the benefit of the Respondent accrete to the Contract.

115. Clause 14.1 of the Contract provides, "*Advance Payment. The Employer shall make an advance payment, as an interest-free loan for mobilization, of N$2,000,000, when the Contractor submits a guarantee in accordance with this Sub-Clause on or before 15.07.2022*."

116. It has been suggested that the Contract between the Parties has, at a minimum, been inspired by the standard-form FIDIC contract. Indeed, the language contained in Clause 14.1 resembles language found in Clause 14.2 of the 2017 FIDIC Silver Book standardized contract. However, the language of the Contract lacks any mention of repayment terms and schedule. To be sure, I have been provided only excerpts from the Contract.

117. How then is this clause, stripped bare of repayment terms, to be read? Sub-Clause 14.1 merely states, "*The Employer shall make an advance payment, as an interest-free loan for mobilization…."*

118. The purpose of an Advance Payment in a FIDIC contract is to provide a contractor sufficient liquidity, i.e., cash flow, in order to mobilise its resources and commence work on a project. As the purpose of the Advance Payment is to provide the Contractor cash flow (i.e., to maintain its outflows), monies expended from the Advance Payment are necessarily to the benefit of the Employer. In all editions of FIDIC contracts, this Advance Payment is then "repaid" over the course of the project in installments. Whereas in the Red and Yellow books, it is repaid by a system of certificates, in the Silver book, it is "repaid" out of funds owing to the contractor, i.e., the IPCs.

119. However, this "repayment" is merely an accounting device. In reality, where an Advance Payment has been paid, the values of the IPCs are correspondingly lowered. This reflects a repayment schedule, where the Advance Payment is repaid at a steady rate. Indeed, although the language of "interest-free loan" might be used, it is entirely possible that a schedule of IPCs might simply reflect the repayment without a need to mention it.

120. Furthermore, a repayment schedule is merely an amortisation schedule whereby the initial Advance Payment is written off over the course of the project. It is in this way that accounting practice and reality diverge; it could well be the case that the entire Advance Payment is consumed in ways that benefit the Employer early in a project. Indeed, the presumption apparent in the Contract that the deductions from the IPCs correspond to the actual consumption of portions of the Advance Payment, is weak at best, and readily rebutted with actual evidence; it is virtually impossible that the Advance Payment would be consumed at a steady rate, given the vagaries of a complex construction project.

121. It is for this reason that the characterization put forward in the Respondent's Defence must be rejected out of hand; if the entire sum of money would need to be repaid, presumably

upon completion of the Project or issuance of a Certificate of Completion, that the Contractor would receive a windfall in the form of the time-value of the money over the course of the Project, greater than the time-value of the money the Employer would receive had the Advance Payment been repaid in installments over the course of the Project (assuming, as we must, that the Employer expected the Project to be completed). In other words, this is a commercially absurd interpretation of the Advance Payment term. This absurdity is compounded by the requirement of an Advance Payment Guarantee, procured by the Contractor, unchanging in size over the course of the Project, on commercial terms profitable to the bank or other guarantor providing the Guarantee, who would therefore capture that time-value from the Contractor. Why would an Employer transfer that time-value to the guarantor, when it could require the Contractor simply to take out a loan from a bank?

122. Furthermore, the Respondent's characterization flies in the face of commercial practice. In reality, advance payment guarantees are themselves reduced in value, and payments of profits representing interest are correspondingly reduced in value, over the course of the Project. The Employer does indeed transfer some time-value to the Contractor and guarantor, but in ever-decreasing amounts as the Project progresses and the Contractor's cash flow is restored after mobilization.

123. The characterization put forward by the Claimant and Mr Tarens is an incomplete "projection"[5] of the more complete nature of the Advance Payment. If the project is completed, then there should be no Advance Payment to repay, as it has been amortised over the course of the Project. However, if the project is not completed, then the deductions from the IPCs may not represent the actual amounts of Advance Payment consumed in the partially completed Project. The Claimant's claim that it is *a priori* entitled to the entirety of the Advance Payment must also be rejected as conceptually flawed; the Advance Payment was indeed a loan, not a separate payment for mobilization.

124. However, the legal authority put forward by the Claimant, *Kierste and Bekir, 2014, NCA/99/2014*, confirms the analysis above, wherein Honourable Judge Abdul Brakier stated, "*Where a project fails before it is completed, the Advance should be proportioned as to what has benefitted the Employer*." This Northistan judgment is applicable to the substance of the dispute.

125. The characterizations put forward by the Claimant's expert witness and the Defendant's expert witness evince the same, correct, interpretation of the nature of the Advance Payment, though they differ as to the degree to which the Advance Payment in the present case has been consumed (addressed below). Each addresses the question as to the degree to which the Advance Payment has been applied to the Project, and thus the Respondent.

126. It is for this reason that I must use my powers of rectification to rectify the present Contract. It is clear, by virtue of the fact that it lacks any mention of repayment terms or time-frame, that it lacks all terms agreed by the Parties as to the nature of the Advance Payment. Adopting the most conservative interpretation of the Parties' intention, evinced by their neglect to put a repayment schedule into their contract, it is clear that the monthly sums

[5] In the geometrical sense that a circle is a projection of a sphere onto two-dimensional space.

of the IPCs in Clause 14.2 reflect sums that have already been adjusted to take account of repayment of the Advance Payment.

127. In the alternative, I must use my powers of interpretation of this Contract to identify an implied term in this contract. In *Equitable Life Assurance Society v Hyman* [2000] UKHL 39, which it is argued is of general application, the House of Lords of the United Kingdom found that a term needs to be implied when it is necessary to give effect to the reasonable expectations of the contracting parties. In light of this Contact's inspiration from the FIDIC contracts and the commercial absurdity of the Respondent's interpretation on a bare reading of the words of the contract, it is necessary to imply a term to the effect that the monthly sums of the IPCs in Clause 14.2 reflect sums that have already been adjusted to take account of repayment of the Advance Payment.

128. At the same time, it is necessary to imply a term that repayment of unconsumed Advance Payment is accelerated upon early termination of the Contract. Upon termination, the Employer derives no benefit from supporting the cash-flow of the Contractor, and would lose the time-value of this money if it need not be paid back immediately; even a schedular repayment would lead to commercial absurdity.

129. I therefore hold that the Advance Payment may not, in principle, be used to cover the outstanding IPCs; should it be found that not all of the money advanced under the Advance Payment has been consumed and accreted to the Contract, that money may be used to pay unpaid IPCs by way of set-off.

Evaluation of Expert Reports regarding Consumption of Advance Payment

130. Two factual accounts as to the consumption of the Advance Payment have been presented: the first from Evan Llywd, party expert for the Claimant; the second from Jackie Jones, party expert for the Respondent.

131. From the outset, I must make it clear that I have been presented with only two factual assertions as to the degree to which the Advance Payment has been consumed to the benefit of the Respondent. It is not open to me to "split the difference". Article 28 of the UNCITRAL Model Law and Article 35 of the UNCITRAL Rules both provide, "*The arbitral tribunal shall decide* ex aequo et bono *or as* amiable compositeur *only if the parties have expressly authorized it to do so.*" The Parties have not granted me this power.

132. Article 27 of the UNCITRAL Rules provides:

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

[…]

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

133. Evan Llywd, for the Claimant, stated, "*I have done a forensic accounting of the use of the Advance and find that the Advance was used entirely for the benefit of the Employer, and as such, the Advance should be considered as part of the due amounts in addition to the IPCs.*" The phrase "due amounts" is perhaps unfortunate, but it is clear that Mr Llywd meant that the value of the Advance Payment was due to the Claimant; as it had already been paid to the Claimant, it of course need not be paid again.

134. Jackie Jones, for the Defendant, stated, "*I have done a forensic accounting of the monies in the Advance and have concluded that when the Contractor left the site it took with it machinery of the value N$735,764 that it did not own at the beginning of the project. This would indicate that at least N$735,764 of the N$1,000,000 was of benefit to the Contractor.*"

135. At the time of the hearing, I noted that the Respondent's expert opinion was submitted to the parties, but the Claimant did not make any comment on this matter. In the Hearing, I asked Claimant's counsel if they would like to comment and received the answer, "*I have no instructions on this point.*" I looked at the Claimant Party but there was no answer and I continued the Hearing.

136. Article 5 of the IBA Rules concerns Party-Appointed Experts, and requires that an expert report be accompanied by "*a description of his or her background, qualifications, training and experience.*"

137. Article 9 of the IBA Rules provides, "*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"

138. None of the experts' testimony is entirely satisfactory:

138.1. I have no explanation why Claimant's counsel had no instructions regarding the issue of the machinery;

138.2. I have no explanation why the Claimant did not provide instructions to its counsel during the Hearing;

138.3. Ms Jones is described as an expert on FIDIC contracts, and nothing indicates she was qualified to undertake forensic accounting;

138.4. The testimony of Mr Llwyd is vague;

138.5. The Respondent appears to have claimed exceptional costs, at least in part attributable to its expert witness.

139. I must therefore decide whose testimony I find more credible.

140. On balance, I find the testimony of Mr Llwyd more credible.

140.1. Most importantly, Mr Llwyd is described as "*an expert in delay damages and commercial financing*". Ms Jones is described as "*an expert in FIDIC type contracts*", which appears to make her qualified to consider liability, but not quantum, and makes her as qualified as I am to undertake forensic accounting. In other words, Ms Jones does not appear to have the training necessary to undertake forensic accounting; her testimony is fruit from a less-healthy, if not poisoned, tree.

140.2. Although costs at least in part attributable to Ms Jones are exceptional and unexplained, I find that this has no bearing on her credibility.

140.3. Although Mr Llwyd's conclusion may be vague, I attach no importance to the apparently exact figures Ms Jones produces; indeed, considering a rhetorical strategy appealing to *logos*, the use of supposedly exact figures can exert a powerful psychological attraction of which it is best to be sceptical. Without corroborating evidence, Ms Jones's account is just as vague Mr Llwyd's.

140.4. No rule of evidence allows me to make an adverse inference from the silence of the Claimant during the Hearing. It is clear that the Claimant's expert witness had already addressed the issue of the consumption of the Advance Payment in his expert report. Although counsel stated it had no instructions, it is clear that the Claimant had already provided an answer to this assertion by the Respondent. Any number of explanations for this event is possible: counsel may have forgotten, however temporarily, that this point had been addressed in Mr Llwyd's report; lay representatives for the Claimant may not have been following proceedings carefully and may not have understood what was happening; or they may have not understood that my gaze was an instruction for them to give counsel instructions. Indeed, it may have been the case that the figures presented by Ms Jones were so disconnected from reality that the Claimant's representatives did not know how to answer them.

141. On balance, I believe the testimony produced by Mr Llwyd is more credible than that of Ms Jones. My principal reason for concluding this is that Mr Llwyd is qualified to undertake forensic accounting, whereas Ms Jones does not appear to be. Ms Jones's written testimony simply cannot be characterized as an "expert testimony".

142. The testimony produced by Mr Llwyd is therefore approved.

Conclusion: The Respondent May Not Use the Advance Payment to Cover Sums Owing on IPCs 5-8

143. The elements described above must now be assembled:

143.1. IPCs 5-8 were validly claimed and certified, and thus owing.

143.2. The Claimant validly terminated its Contract, and should not suffer any prejudice from this.

143.3. The Advance Payment was an interest-free loan for the purpose of supporting the cash flow of the Claimant during the initial stages of the Project. As the Advance Payment was to be amortised, in principle it was not available to cover unpaid IPCs, though sums not consumed could be employed via set-off for that purpose.

143.4. The Advance Payment was to be amortised over the course of the 48 months of IPC payments, which, by way of a necessary implied term, had been reduced to reflect that repayment.

143.5. The amortization of the Advance Payment was a (fictional) accounting technique based on the expectation that the Project would be completed. Analysis of the consumption of the Advance Payment is instead a factual inquiry.

143.6. On balance, the assertion by Mr Llwyd that the entirety of the Advance Payment had been consumed in the first eight months of the contract is the most credible account.

143.7. The Advance Payment had been entirely consumed and therefore was unavailable as funds to set off payment on unpaid IPCs.

144. I find therefore that IPCs 5-8 remain outstanding, and I declare that the Respondent is liable for a total of N$2,000,000.

CONTRACTUAL ISSUE ON LIABILITY REGARDING TANK ROOM NO. 8

Introduction

145. In contrast to the previous section, this section is heavily dependent on the facts adduced by the Parties.

146. Although the Claimant was not entitled to undertake a variation without following the procedures contained within Clause 13 of the Contract, the Claimant was entitled to, and in effect required to, mitigate its loss and attempt to fulfil its general contractual duties upon the breach of contract by the Respondent, as Employer, and the Engineer. Both the Respondent and the Engineer, an employee of the Respondent, breached the Contract by engaging in acts of negligence and negligent performance of contractual duties between the start of work and the moment the Claimant, as Contractor, instructed its staff to engage in efforts to mitigate its loss from these breaches and fulfil its general contractual duties. This account provides a better explanation of the Claimant's response to events than those insinuated by the Respondent. The Claimant's response to events was reasonable in the circumstances, and on general principles the Respondent is liable for the costs of the Claimant's efforts at mitigation.

Variation Procedure

147. Clause 13 of the Contract provides for variation of the works of the contract.

147.1. Sub-Clause 13.1 provides the Engineer the right to initiate variations.

147.2. Sub-Clause 13.2 provides the Contractor the ability to propose Value Engineering Variations to the Engineer; this clause does not impose a duty on the Engineer to accept the proposal.

147.3. Sub-Clause 13.3 provides for a procedure by which variations would be adopted. This imposes rights and duties on both the Engineer and the Contractor.[6]

148. Sub-Clause 4.4 imposes a general duty of care upon the Engineer and the Parties when making determinations regarding variations and other matters; "*the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not reached, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. The Engineer shall give notice to both Parties of each determination. Each party shall give effect to each determination unless and until revised under clause 21 [Arbitration].*"

149. Immediately a tension within Sub-Clause 4.4 can be seen; even if the Engineer is in breach of its duty to make a fair determination, it does not appear that the duty of a party to give effect to that determination until arbitration revises it is suspended. However, the Respondent has not alleged that the Claimant has breached its duty under Sub-Clause 4.4 and does not in any other way rely upon it. Pursuant to Article 27(1) of the UNCITRAL Rules, the burden rests with the Respondent to prove facts to support its defence; the Respondent has not done this and I find this possible argument waived by the Respondent.

Negligence of Employer and Engineer

150. It is a cardinal principle of virtually all legal systems that a duty to execute contractual duties at a level of reasonable care and skill. This is found in both common law jurisdictions and in civil law jurisdictions, and although no authority as to the application of this principle in Northistan has been cited to me, I believe I am entitled to find that this in the present circumstances without offending principles of natural justice or the New York Convention.

151. Should a party be found to have performed its contractual duty negligently, that party will accordingly be found to have breached its contract.

152. On multiple occasions, both the Employer and the Engineer performed their contractual duties negligently. On several of these occasions, the negligence was so obvious as to appear imperceptible. The following record corrects that.

Failure by Employer to Produce Workable Building Plans, c. August 2020

153. On 1 July 2020, the Parties entered into the Contract and the Claimant duly mobilized over the following month. In its Particulars of Claim, the Claimant writes, "*However, the design for Tank Room 8 was a major problem. The original design had been changed to*

[6] Sub-Clause 13.3 mistakenly refers to "Sub-Clause 3.5 [Determinations]", when it should in fact refer to Sub-Clause 4.4. I hold Sub-Clause 13.3 rectified to remedy this.

include a stairway and mezzanine and because of these changes, the machinery designated for Tank Room 8 was not going to fit."

154. At the Hearing, I inspected the artist's impression; the machinery would indeed have to pass through the mezzanine and stairs and would be impossible to fit into the Employer's design. I enquired as to the agreement of the Parties that this was the actual design of the Employer and that the me machinery was the assigned machinery. The Parties agreed it was.

155. Although not presented in the extracts from the Contract with which I have been presented, it is clear that the Respondent as Employer had the duty to produce plans for the project.

156. *Res ipsa loquitur* is a phrase that means "the thing speaks for itself". If the plans produced by the Employer were physically impossible to build, I do not need to inquire into the mind of the Respondent to find negligence. Plans for works that are impossible simply demonstrate without more a lack of reasonable care and skill in their preparation.

Failure by Engineer to Address Concerns in Month 2, c. September 2020

157. Lesley Randal, Engineer for the Respondent, states, "*The Claimant told me that the designs for Tank Room 8 were wrong back in month 2.*" I interpret "Month 2" to mean September 2020, as the works commenced August 2020.

158. It is at this point that I am capable of peering into the mind of the Respondent, who was at this point at least constructively aware of the problems with Tank Room No. 8.

159. As the Respondent was under a continuing contractual duty to produce building plans capable of being built, the Respondent was in breach of contract when the Claimant made its concerns known.

Negligence and breach of contract under Sub-Clause 13.1

160. Sub-Clause 13.1 states, "*The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating that… (ii) it will reduce the safety or suitability of the Works. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.*"

161. By the Engineer's testimony, it is clear that the Claimant gave notice to the Engineer.

162. First, it is clear that the Engineer executed its duty to "confirm" the instruction negligently, as the Engineer confirmed building plans that were incapable of being built.

163. Second, it is clear that this constitutes a Determination that the Engineer executed in breach of its duty to make a fair determination, taking due regard of all relevant circumstances, pursuant to Sub-Clause 4.4. The fact that the plans were incapable of being built indicates the Engineer did not take due regard.

Negligence and breach following 5 October 2020

164. By both the Claimant's Particulars of Claim and the Engineer's testimony, the Claimant repeated its concern to the Engineer on 5 October 2020.

165. There is a factual dispute as to what happened next. The Claimant states in its Particulars of Claim, "*The Engineer did not reply…*" whereas the Engineer states, "*it was 5th October, but the works were not even nearly to that stage at the time and we agreed to park the matter until the time came.*"

166. If the Engineer's account is taken as fact, general negligence and breach of Sub-Clause 4.4 are again found. Although the Claimant appears to agree to hold off enforcing this duty, no contractual right to withhold performance, estoppel or similar legal mechanism is pleaded.

167. If the Claimant's account is taken as fact, general negligence and breach of Sub-Clause 4.4 are again found, exacerbated by the Engineer's conscious, i.e., reckless, refusal to deal with the matter.

Value Engineering Variation Request and Response

168. On 8 October 2020, the Claimant submitted a Value Engineering Variation request pursuant to Sub-Clause 13.2. The Claimant stated it did this because it had not heard from the Engineer; the Engineer stated she was "*really confused*" because of her earlier understanding of things.

169. The Engineer claims that she "*took it to the Employer and explained the problem was probably very real but that we were not at the stage of building Tank Room 8 yet anyway.*"

170. Possibly concerning this two-day period, Marco Pryon states, "*We never said that the works to Tank Room 8 were unnecessary but the Claimant did not give us full opportunity to investigate and do a cost analysis….*"

171. On 10 October 2020, according to the Claimant, "*The Engineer replied on 10.10.20 saying that the Contractor was not responsible for design work and had to build as designed.*" Jacob Tarens confirmed this in his witness statement.

172. It is possible to evaluate the actions of the Engineer against contractual requirements.

172.1. Pursuant to Sub-Clause 13.3, it is true that the Engineer responded "*with approval, disapproval, or comments,*" albeit in a perfunctory manner.

172.2. Pursuant to Sub-Clause 4.4, the Engineer was under a duty to "*consult with each party in an endeavour to reach agreement.*" The Engineer did consult with the Respondent, but does not appear to have engaged the Claimant. Whether the Engineer endeavoured to reach agreement is ambiguous.

172.3. Pursuant to Sub-Clause 4.4, the Engineer was under a duty to "*make a fair determination in accordance with the Contract, taking due regard of all relevant*

circumstances." Once again, the Engineer has failed to fulfil its duties under this clause. The plans remained impossible to build; instructing the Claimant to "*build as designed*" does not evince "*due regard*". The Engineer cannot also be said to have exercised her duties with reasonable care and skill by endorsing plans that by their nature frustrate the Contract.

Late October 2020 Events

173. After this rejection, the Claimant and its representatives apparently made further attempts to deal with this problem, stating it had "*tried very hard to get the Engineer to come and see the room and the problem and to show him the work-around but he said he was too busy and refused to even discuss the problem.*"

174. This evinces further violation of the Engineer's duties under Sub-Clause 4.4 and general principles.

Summary of Negligence and Negligent Breach of Contract

175. During the period between 1 July 2020 and 1 November 2020, the Employer and the Engineer engaged in a course of conduct that created the problems associated with Tank Room N. 8, prevented the Parties from sorting out the problems associated with Tank Room No. 8, and obfuscated and mischaracterized the problems associated with Tank Room No. 8.

176. During this time, the Claimant fulfilled its procedural obligations under Clause 13.

Claimant's Actions Flow from Engineer's Negligence

177. On 1 November 2020, the directors of the Claimant gave the ground team instruction to go ahead with the proposed changes to Tank Room No. 8.[7]

178. The Claimant was motivated by a desire to prevent delays to the Project and its performance of its obligations under the Contract. In the Particulars of Claim, the Claimant stated that that it had explained to the Respondent that the changes "*had been made to prevent any delay in the project*." In his witness statement, Mr Tarens states, "*They simply didn't listen to us. Work was moving on and if we didn't deal with Tank Room 8, we would have fallen behind schedule. We had no choice and got on with the work.*" In the Claimant's oral submissions, it states, "*There was no other way of achieving the remit and any delay would have had a knock on effect of delaying other words in the project.*"

179. On 3 November 2020, the Claimant wrote to the Employer directly, who wrote back to say that the changes were unsolicited, that they should not have been undertaken without permission, and would not be compensated.

180. From the perspective of the Claimant, the Respondent and the Engineer engaged in a course of conduct that constituted breach of contract and, without modification, would frustrate the Contract. The Claimant had been given no assurances that at some later point,

[7] This is contrary to the assertion by the Engineer that they had been done in the last two weeks in October 2020.

the issue with Tank Room No. 8 would be dealt with; rather, the Claimant was repeatedly told it would have to build according to plans that were impossible to follow. Undertaking the revised works appeared to be the only option available to the Claimant.

Claimant's Actions were Reasonable in the Circumstances

181. Mitigation is a principle of law found in both common law and civil law systems. On orthodox principles, it is not exactly a "duty", but rather a statement that damages will be measured based on the actions a reasonable person would take in the claimant's position. A reasonable person would attempt to prevent the consequences of a breach of contract or other duty from compounding. This is measured within a certain margin of appreciation; it does not require that perfect or flawless mitigation efforts be effected, but merely that they be reasonable.

182. The Claimant cites *Thacket and Grimes, 1987,* NCC/122/87 in which Judge Harmond stated, "*the performer of the work has an ongoing duty to mitigate damage wherever it may be found and reasonable compensation for such mitigation must be forthcoming.*"

183. Against this, the Respondent argues, "*there was no damage in the matter of Tank Room 8 and as such there was no duty to mitigate.*"

184. The submission by the Respondent is severely misguided, as it appears to believe the word "damage" concerns only physical damage. Rather, "damage" defined much more broadly to include all legal and material prejudice suffered by a claimant. Delay itself is a considerable head of damage. In the present case, other damage that could have flowed from continuing delays could include:

184.1. lost opportunity costs, including other construction contracts;

184.2. disruption of business plans and disruption to relationships with suppliers, subcontractors, and other contracting parties;

184.3. disruption to employees' personal lives;

184.4. excess payments on the Advance Payment Guarantee and other financial instruments;

184.5. reputational damage from not completing the Project on time;

184.6. all other manner of direct and consequential loss.

185. Given these and other potential consequences, it is clear that the duty to mitigate loss under *Thacket* applies to the present case.

186. It is clear from the Parties' submissions that the Claimant's actions were reasonable.

186.1. The Respondent stated, "*The internal investigation concluded that the unsolicited works done to Tank Room 8 were not desirable but did improve the design to a certain*

degree; certainly not to the extent of the "costs" quoted by the Claimant. We will provide expert evidence to this effect." However, the Respondent did not provide expert evidence to that effect.

186.2. Jackie Jones stated, "*The works done to Tanks Rooms 5 through 9 were a good solution to the defects in the designs but there may have been cheaper alternatives that satisfied the needs of the Respondent. For example, it may have been viable to remove Tank Room 8 entirely and downsize the project. This may have been a good solution for the Respondent particularly given the funding problem.*" This statement, by the Respondent's expert witness, shows that the mitigation efforts done by the Claimant were "reasonable" if not "perfect.

186.3. The Engineer acknowledged, "*the Contractor…did works to Tanks Rooms 5 through 9…to solve the design problem in Tank Room 8.*" This acknowledges that they did indeed solve the design problem.

186.4. The Claimant's expert witness states, "*I can confirm that the works done to Tank Rooms 5 through 9 to compensate for the errors in the Employer's design of Tank Room 8 were necessary and certainly the cheapest option for making good on the design.*" Although it was improper for the expert to comment on the Employer's liability, this witness confirms that the works done were reasonable.

187. The Respondent's characterization that the Claimant "went rogue" and did whatever it wanted at whatever price is simply false. It was forced to confront a situation where the Respondent and the Engineer had apparently frustrated the Contract by means of multiple breaches of contract. It did what was reasonably necessary, and it did it, according to multiple witnesses, at a fair price.

188. I therefore find that the Claimant engaged in reasonable mitigation efforts consequent to the Respondent's multiple breaches of contract, for which it is entitled to be compensated pursuant to the holding in in *Thacket.*[8]

189. Finally, the Respondent's reliance on *Angcleric and Booth, 2001, NCA/21/2001* is misguided. The judge in this case stated, "*a contractor cannot simply decide to make changes to the works designed by the employer, the employer must be given opportunity to decide how to handle problems that arise during the process.*" It is clear that the Employer was given ample opportunity to decide how to handle problems over the course of three months; the Respondent chose not to take those opportunities, and indeed made the situation worse by insisting that the Claimant attempt to fulfil impossible plans without discussion.

[8] Additionally, Sub-Clause 13.3 provides, "*The Contractor shall not delay any work whilst awaiting a response.*" In the present circumstances, it is clear that most work had been delayed (or rendered impossible) due to the Respondent's actions, yet the Claimant remained under a duty to continue working. The Claimant was therefore put in an impossible position, and – admirably – chose to continue to work and fulfil its obligations.

Alternative Explanations Rejected

190. There is some insinuation in the Respondent's statements that the Claimant had created an artificial urgency to the need to remedy design defects regarding Tank Room No. 8.

190.1. Mr Pryon states, "*We never said that the works to Tank Room 8 were unnecessary but the Claimant did not give us full opportunity to investigate and do a cost analysis, there may have been a better work around for it but they just went ahead and did the work unsolicited.*"

190.2. The Engineer states, "*but the works were not even nearly to that stage at the time*" and "*we were not at the stage of building Tank Room 8 yet anyway. The Contractor though made some changes to the work schedule to deal with the Tank rooms earlier than scheduled and did works to Tanks Rooms 5 through 9 over the last two weeks in October, to solve the design problem in Tank room 8.*"

191. The insinuation apparent to me is that the Claimant was somehow aware of the Respondent's loss of financial support, and rushed to undertake mitigation works that expanded the scope of the Project before the consequences of that manifested, enabling the Claimant to secure financial benefits before any questions as to solvency arose.

191.1. It is true that Mr Tarens stated, "*Of course, it turns out that their inability to pay had nothing to do with our "unsolicited" work or anything to do with us, but rather that their funders cut the funding for the project. I mean we knew of course but the funders were nothing to do with us, that's Pyro's business not mine, we never mentioned it.*" This statement does not indicate when exactly he discovered that the Respondent had lost its funding. It appears to indicate discovery of this fact after the mitigation works on Tank Room No. 8 had been undertaken, and appears to convey a rejection of this as an excuse. On its face this does not constitute an admission that he had taken advantage of the Respondent's financial difficulties.

191.2. More straightforward evidence comes from Mary Bell, secretary to Mr Tarens, who indicates that she learnt of the loss of funding at a Christmas party, which puts her discovery of this fact approximately seven weeks after the Claimant undertook the mitigation works. Imputation of knowledge in either direction between Mr Tarens and his secretary is best avoided as speculation, but an inference can be made that it is at least possible that neither knew about this development until the Christmas party.

192. On balance of probabilities, this insinuation, and its effects on the mitigation analysis above, should be rejected. A responsible contractor would be more interested in ensuring the long-term viability of the project, rather than securing a short-term financial gain that further imperiled the financial status of its employer; after all, a long-term strategy would ensure greater financial returns.

193. Finally, there has been insinuation from the representatives of the Claimant that the principal motive of the Respondent in opposing payment for the mitigation works was their own knowledge of their precarious financial state. This may well be true, but is irrelevant to

the present analysis; no element of good faith in the contract law of Northistan has been adduced to me, and the Respondent remains free to base its legal theories on the rights it asserts.[9]

Summary: Respondent's Liability for Mitigation Costs

194. To summarize, it is not on the basis of the variation procedures in Sub-Clause 13.2 that the Claimant bases its claim for compensation for the works it did to remedy design defects regarding Tank Room No. 8, but rather in the principles of mitigation as expressed in the general law and in the decision in *Thacket.* The Claimant's mitigation efforts were consequent to the Respondent's multiple breaches of contract. On all evidence adduced, by both parties, these efforts should be considered reasonable. The Claimant does not appear to have undertaken these mitigation efforts in order to exploit the Respondent's financial weakness for short-term gain.

195. Pursuant to the decision in *Thacket*, the Claimant is entitled to just compensation for its mitigation efforts.

Quantum

196. There is little disagreement as to the value of the works done by the Claimant.

196.1. In its Particulars of Claim the Claimant sought only material costs, not workmanship, and therefore seeks N$1,000,000.

196.2. Mary Bell costed the work at N$1,232,532.21, which included N$225,000 for workmanship. This leaves N$1,007,532.21 for materials, which is greater than what is claimed. Ms Bell is not an expert.

196.3. Evan Llywd, an expert in delay damages and commercial financing, conducted forensic analysis and confirmed that the figures produced by Ms Bell are correct.

196.4. Jackie Jones, expert witness for the Respondent, states that the works done were "*a good solution*" but there "*may have been cheaper alternatives…*" Ms Jones therefore does not dispute the accuracy of the figures.

196.5. Although the Respondent declared in its Defence that it did not believe that Tank Room No. 8 was improved to the level of costs claimed by the Claimant, and stated that it would provide expert evidence to this effect. However, Ms Jones did not accomplish this for the Respondent. In written submissions, did not address this directly, stating, "*Whilst it may be true that the Contractor's new designs would have been correct and allowed the full functionality, the actual building work achieved with this N$1,000,000 did not include the mezzanine or stairways or any of the machinery housing etc let alone the machinery itself.*" It remains ambiguous as to the degree to which the Respondent

[9] For a dramatic illustration of this principle, the reader is directed to *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8.

accepts the figures put forward; this most recent statement appears to acknowledge that N$1,000,000 of work had been done.

196.6. During the Hearing, I noted the amount in question was actually higher than the N$1,000,000 claimed. The Claimant stated it did not wish to amend its claim. Despite an outburst by Mr Tarens regarding interest, I interpreted the Claimant's statement that it would not amend its claim to seek a higher amount as a sign of good faith by the Claimant.

197. As there is no substantial disagreement as to the amount claimed by the Claimant in regards to its mitigation works, and as there is considerable evidence put forward by Mary Bell (under the business records exception to the hearsay rule) and confirmed by expert Evan Llywd, I accept the sum of N$1,000,000 as representing the cost of materials expended by the Claimant in undertaking mitigation works.

198. N$1,000,000 therefore constitutes just compensation for the Claimant's mitigation efforts.

THE AWARD

199. For all of the reasons given above, I make the following findings of fact and law.

Summary of Preliminary determination regarding jurisdiction in relation to Notice of Arbitration

200. I find that I have jurisdiction to see this matter. I find that a typographical error or confusion as to the spelling of the name of a party does not invalidate a Notice of Arbitration. There are cost implications to be taken into account for this matter.

Summary of Preliminary determination regarding jurisdiction in relation to arbitration clause

201. I find that I have jurisdiction to see this matter. I find that the Arbitration Clause as agreed between the Parties does not impose the constitution of a Dispute Board as a condition precedent to the filing of a Notice of Arbitration. There are cost implications to be taken into account for this matter.

Summary of Evidential determination

202. I find the document discovered by the Claimant, who attempted to introduce it into evidence, to be inadmissible as a privileged document as a confidential document between the Respondent and its counsel. There are cost implications to be taken into account for this matter.

Summary of the Substantial Issue concerning non-payment of IPCs and Advanced Payment

203. I find that IPCs 5-8 are properly certified and remain payable. I find that the Advance Payment may not be used to cover outstanding sums due on IPCs 5-8, as the Advance Payment has been consumed by activities attributable to the Contract.

204. As such, the Claimant is granted a declaration to the effect that IPCs 5-8 were duly certified and are payable, the Respondent is ordered to pay the Claimant the principal sum of:

204.1. **E£3,000,000 for the unpaid IPCs**

205. Interest shall run on each IPC from the date it because payable, and shall be calculated in the 'restitutionary' manner described below.

Summary of the Substantial Issue concerning mitigation works done on Tank Room No. 8

206. I find that the mitigation works done on Tank Room No. 8 fall outside the provisions concerning variations contained within Clause 13. I find that the Respondent breached multiple obligations under the Contract, requiring the Claimant to mitigate its losses. I find the manner in which the Claimant mitigated its loss, by undertaking works to remedy design flaws produced by the Respondent, to have been reasonable. I find that there is no dispute as to the value of those works.

207. As such, the Claimant is granted an award of:

207.1. **E£1,500,000 for the costs of the changes made to Tank Room 8**

208. Interest shall run on this claim from 1 November 2020, and shall be calculated in the 'restitutionary' manner described below.

Summary of Interest

209. I find that I have the authority to award interest based on general compensatory and restitutionary principles. The UNCITRAL Model Law and the UNCITRAL Rules are silent as to my authority, and I have not been presented with the law relating to the award of interest of the seat of arbitration, Easthead.

210. A distinction[10] must be made between primary liabilities that principally take the form of a debt, and secondary liabilities that principally take the form of damages. A compensatory award looks to what a claimant has lost, whereas a restitutionary award looks to the benefit that has accrued to the respondent. It is for this reason that simple interest is awarded for compensatory awards, as damages reflect a claimant's loss. On the other hand, compound interest is awarded as it represents what use a respondent could make with the benefit in his hands.

[10] The following analysis employs arguments made in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34. The ruling of the Supreme Court in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39 concerns statutory interpretation and does not affect the conceptual analysis.

211. I categorize the awards to the Claimant as follows:

211.1. Non-payment of IPCs concerns outstanding debts, and thus a restitutionary award is appropriate.

211.2. Works undertaken in mitigation of loss, in the hands of the Respondent, are a proprietary benefit, and thus a restitutionary award is appropriate.

211.3. Costs merely compensate the Claimant for expenditure in this arbitration, and thus a compensatory award is appropriate.

212. It is far beyond the scope of this arbitration to make provisions for an additional award for interest, let alone based on the "subjective devaluation" the Respondent might ascribe to the benefit in his hands. Indeed, the categorization of the Claimant's claims as compensatory or restitutionary might already be considered generous to the Claimant. To that end, I have adopted the Sterling Overnight Index Average (SONIA), a risk-free rate (i.e., generous to the Respondent) that is compounded daily, which has replaced LIBOR, for the following restitutionary awards.

213. In undertaking these calculations, I have made use of the calculator found on this website: https://www.realisedrate.com/SONIA

214. I award the following restitutionary interest awards, based on an award date of 13 June 2022:

Claim	Date	Original value (N$)	Award (N$)	Award (E£)
IPC 5	28 January 2021	500,000	1,485.16	2227.74
IPC 6	28 February 2021	500,000	1,465.79	2198.685
IPC 7	28 March 2021	500,000	1,445.03	2167.545
IPC 8	28 April 2021	500,000	1,424.99	2137.485
Mitigation works	1 November 2020	1,000,000	3,093.04	4639.56
Total				13,371.015

215. I award the following for compensatory interest awards, as determined in the "Costs" section below. I have taken the average Bank of England interest rate as the basis for a calculation of simple interest, where 2021 had an average rate of 0.1%, and 2022 had an average rate of 0.2%.

Claim	Date	Original value (E£)	Interest rate	Award (E£)
Claimant's costs	13 June 2022 (0 days)	350,000	0.2	0
Claimant's fees	15 July 2021 (333 days)	29,000	0.15	39.69
Claimant's fees	14 February 2022 (119 days)	29,000	0.2	18.91
Total				58.6

216. Thus, on the date of the Award, I award the Claimant 13,429.615 in interest.

217. I order that the unsuccessful party is to be given a grace period of 14 days from the date of this award to make payment to the successful party, during which time no interest shall run.

218. In regards to post-award interest, on standard principles, I have discretion to award a higher interest rate to deter non-compliance.

219. Should the unsuccessful party fail to make payment within this 14-day period, interest will run from the 15th day at a rate of 2*SONIA rate calculated daily for restitutionary interest awards and 8% simple interest rate calculated daily compensatory awards, for non-compliance with the award. I consider this rate to be appropriate and proportionate.

Summary of Costs

220. I find that I have the authority to award costs pursuant to Article 40 et seq of the UNCITRAL Rules, the Parties' requests, and their agreement in the Preliminary Meeting. This authority is subject to the Parties' agreement, made at the Preliminary Meeting, that costs be capped at E£500,000 per party total.

221. Article 42 of the UNCITRAL Rules provides,

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

222. I have been presented with evidence of three settlement offers prior to the filing of the Notice of Arbitration.

222.1. On 7 June 2021, the Claimant made a first offer of N$3,000,000 in outstanding payments and the return of the letter of credit. The Respondent refused to pay this amount, and though it did not cash the letter of credit, it threatened to do so.

222.2. On 15 June 2021, the Respondent made an offer of N$1,000,000 and offered to return the letter of credit. The Claimant summarily refused this offer on 16 June 2021.

222.3. On 20 June 2021, the Respondent made an offer of N$1,500,000. The Claimant refused this offer on 1 July 2021, shortly before issuing the Notice of Arbitration.

223. I have been presented with evidence concerning the payment of the costs of the arbitration. The Respondent has refused to pay any fees during the process, and the Claimant has paid the entirety of the costs, including a total of E£29,000 on behalf of the Respondent, after I said I would withhold the Award until payment of the outstanding costs and fees was made.

223.1. The Claimant has paid E£18,000, the entire cost of the arbitration.

223.2. The Claimant has paid E£40,000, my arbitrator's fees.

224. The Parties have submitted cost sheets in regards to the arbitration:

224.1. The Claimant has claimed E£350,000.

224.2. The Respondent has claimed E£1,200,000, which it has claimed to be reasonable despite the agreed cap.

225. I note the following actions undertaken by the Claimant that have negatively affected proceedings:

225.1. The Claimant sought to introduce documentary evidence of a privileged nature. This required me to have the Parties submit short written briefs on the matter and address the admissibility over the period of one hour on 13 January 2022.

225.2. Mr Tarens, Managing Director for the Claimant, verbally interrupted proceedings to make a joke in regards to the accumulation of interest on the mitigation works.

226. I note the following actions undertaken by the Respondent that have negatively affected proceedings:

226.1. The Respondent sent an email to me, the EAI, and the Claimant on 15 July 2021, denying that I had been properly appointed and denying that the tribunal had been properly constituted, in violation of UNCITRAL Rules Article 3(5).

226.2. The Respondent brought a jurisdictional challenge in regards to a typographical error in its name in the Notice of Arbitration. Most concerns about the identification of parties involve members of corporate groups and new corporate entities following mergers and acquisitions. This jurisdictional challenge bordered on frivolous.

226.3. The Respondent brought a jurisdictional challenge in regards to the interpretation of the Arbitration Clause. The Arbitration Clause quite obviously did not impose the constitution of a Dispute Board as a condition precedent to the bringing of arbitral proceedings. This jurisdictional challenge bordered on frivolous.

226.4. The Respondent violated its agreement with the Claimant, and Order for Directions No. 1, by violating the cap on costs agreed at the Preliminary Meeting.

226.5. The Respondent has claimed excessive fees, nearly four times greater than those claimed by the Claimant, without explanation. The Respondent asserted in its Defence, without basis, a right to claim those fees in violation of the agreed cap.

226.6. The Respondent has failed to make any payments in respect of the fees of the arbitration or my fees as arbitrator.

227. I note that the Respondent has not properly pleaded it should be awarded costs, as its statement in its Defence as regards costs was not within its Prayer for Relief.

228. On balance, the Respondent's behaviour during proceedings has been considerably more disruptive than the Claimant's behavior.

229. Given that the Claimant has been overwhelmingly successful in this arbitration and I see no other indication against a full cost order, I find that the Respondent is liable for both its own fee and the whole of the Claimant's party costs.

230. The Claimant submitted a cost sheet indicating its legal fees to be E£350,000 and the Respondent has submitted a cost sheet indicating its legal fees to be E£1,200,000. Given that I find the Respondent liable for the Claimant's fees and the Respondent's fees are far in excess of the Claimant's, I see no reason to go into a discussion of the proportionality of these fees.

231. The Respondent engaged in settlement negotiations; however, the Respondent's offers were far below what was ultimately ordered. I also note that it was the Claimant who made the first offer, and that offer closely resembles the sums ultimately awarded to the Claimant. Had the Respondent simply accepted the Claimant's offer, arbitration could have been avoided, as the outcome would have been essentially the same. If blame for the institution of proceedings is to be assigned, it lies with the Respondent.

232. The costs to be borne in this arbitration are as follows:

232.1. The Claimant's request for its legal fees of E£350,000 is **granted**.

232.2. The Respondent's request for its legal fees of E£1,200,000 is **denied.**

232.3. The Claimant's payment of E£58,000 for the fees of the arbitration and my fees as arbitrator are to be **reimbursed in full** by the Respondent.

233. As such, the Respondent is ordered to pay the Claimant the sum of E£408,000 in costs, being its legal fees plus Claimant's reimbursement.

DISPOSAL

234. For all of the reasons herein contained:

235. I declare that:

235.1. **IPCs 5-8 remain payable, and cannot be covered by the Advance Payment, which has been consumed to the benefit of the Respondent**.

235.2. **The Claimant rightfully undertook works on Tank Room No. 8 in mitigation of losses caused by the Respondent's multiple breaches**.

236. I order that the Respondent shall pay the Claimant the sums of:

236.1. **E£3,000,000** for unpaid IPCs 5-8

236.2. **E£1,500,000** for works to Tank Room No. 8

236.3. **E£13,371.015** in pre-award interest in respect of Unpaid IPCs and Tank Room No. 8

236.4. **E£58.60** in pre-award interest in respect of costs

236.5. **E£350,000** in costs for the Claimant's legal fees

236.6. **E£58,000** in costs for the fees of the arbitration and the fees of the arbitrator

236.7. **Therefore, a total of E£4,921,429.62 is payable by the Respondent to the Claimant**

237. I award a grace period for the Respondent to pay the above sums of 14 days from the date of this award, being 14 June 2022, during which period no interest shall run.

238. However, should the Respondent fail to settle this Award by 5 PM Central Easthead time 28 June 2022, I order that **non-compliance interest** will run up to the date of payment at a rate of:

238.1. 2 * SONIA rate compound interest calculated daily:

238.1.1. On the unpaid IPC amount of **E£3,000,000**

238.1.2. On the Tank Room No. 8 works amount of **E£1,500,000**

238.1.3. **Therefore, non-compliance interest, calculated as 2 * SONIA rate, calculated daily, will run on the principal amount of E£4,500,000, in the event of non-payment by 5 PM on 28 June 2022**.

238.2. 8% simple interest calculated daily:

238.2.1. On Claimant's legal costs of **E£350,000**

238.2.2. On costs for fees of the arbitration and fees of the arbitrator of **E£58,000**

238.2.3. **Therefore, non-compliance interest, calculated based on simple interest of 8%, calculated daily, will run on the principal amount of E£408,000, in the event of non-payment by 5 PM on 28 June 2022**.

THE EXECUTIVE SUMMARY

239. **In summary, the Respondent is ordered to pay the Claimant the sum of E£4,921,429.62 on or before 5 PM Central Easthead Time on 28 June 2022**.

240. **If the Claimant fails to make this payment on time, it is ordered to pay the Award amount of E£4,921,429.62 plus 2 * SONIA rate on the principal amount of E£4,500,000 calculated daily, plus 8% simple interest calculated daily, to the date of payment**.

By my hand, this Award, made this day of 14 June 2022 in the seat of arbitration, Easthead,

Dr Dara Ngambi,
Arbitrator.

AUTHORITIES

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2017 FIDIC Silver Book

NOTES TO EXAMINER

Variation Procedure

Clause 13.3 appears to contain an error: "*Upon instructing or approving a variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree…*"

I assume that this should be "Sub-Clause 4.4 [Determinations]".

Law governing the arbitration agreement

This is easily the most infuriating element of this exam, as the Exam Papers have not spelt out the law governing the arbitration agreement, merely the seat. They have alluded to the UNCITRAL Law and UNCITRAL Rules, but have not explained how they are incorporated into domestic law. This contrasts heavily with the tutorial paper and the old exam paper.

I have no idea what the significance of the statement, "*Easthead and Westland enjoy a very close statutory relationship,*" is.

I have made an argument that the law of Easthead applies to the arbitration agreement and thus the proceedings based on the seat of the arbitration. However, I have not been presented with the ***name of arbitration statute of Easthead***. This makes it difficult even to write the header, and following convention, I have simply rendered it as an "ad hoc" arbitration.

Part of my motivation for making this conclusion is admittedly an understanding that this exam does not simply seek to test my knowledge of jurisdiction and seat theory.

Expert Testimony Agreement and Order for Directions No. 1

The Stage 1 Paper included a list of matters agreed to by the Parties. It is only in the Defendant's Defence and Counterclaim at [3] that it asserted a right to put forward expert testimony.

The Stage 2 Paper states, "*The Parties agreed during the Preliminary meeting that they would each appoint an expert.*" This simply is not established on the record of Stage 1.

Article 19(1) of the Model Law provides, "*Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*"

No objection has been made by either party as to the introduction of expert evidence by its counterpart, and it can safely be assumed that an agreement has been reached as to the introduction of expert testimony. However, when this agreement occurred is ambiguous on the record. I have stated in the Award that this issue was dealt with at the Preliminary Meeting.

Furthermore, it should be noted that no copy of Order for Directions No. 1 has been provided. Stage 1 states, "*I issued Order for Directions No. 1 the same day reflecting the above matters and also ordering costs in the arbitration as per the agreement of the parties.*"

Inferring from the discussion as to expert testimony, I have inferred that Order for Directions No. 1 included an agreement to allow the parties to adduce expert testimony.

It is my sincere hope that I am not penalized for making these inferences, as an ambiguity was created by the exam papers.

Should it not be the case that this agreement was not made at the Preliminary Hearing but at some later stage, the Award would be modified *mutatis mutandis* to reflect when the agreement and relevant procedural order were made.

Appointing Authority

The UNCITRAL Rules provide for the authority of appointing authorities to appoint arbitrator(s) in cases heard under the UNCITRAL Rules. Article 6(1) of the UNCITRAL Rules provides, "*Unless the parties have already agreed on the choice of an appointing authority…*" This statement allowed parties to agree to an appointing authority.

The UNCITRAL Rules provide at Article 8(1), "*If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.*"

The present case appears to fall within Article 8(1). The Arbitration Clause states, "*A sole arbitrator will be appointed by the Easthead Arbitration Institute, (EAI), in its capacity as appointing authority.*" This uses (apparently) mandatory language – "*will*" – but qualifies that with "*in its capacity as appointing authority.*" The Parties had already agreed that a sole arbitrator was to be appointed by virtue of the other parts of the Arbitration Clause. Arguably, then, Article 8(1) applies.

If it does, the Claimant and the EAI have not complied with it, and arguably the Tribunal lacks jurisdiction.

However, against this must be said: (1) The Respondent has not raised this as a challenge to jurisdiction, which constitutes waiver under Article 4 of the UNCITRAL Model Law; and (2) If jurisdiction fails on this basis, it only fails temporarily; the Claimant will then seek to comply with the requirements of Article 8(1), prompting the EAI to comply with the requirements of Article 8(1). The result will simply be a procedural delay of one month. In the interests of economy, an arbitrator would arguably be justified in asserting her jurisdiction despite this apparent, unargued concern.

Further, pursuant to the arbitrator's *Kompetenz-Kompetenz*, the arrogation by the EAI unto itself of its power to correct its records is of no concern. It is for the arbitrator to determine the validity of her appointment by the appointing authority, not for the appointment authority to undermine it with administrative procedures.

New Evidence

In Stage 2, page 4, the Exam Paper states "*because the document was obtained without the permission of the Claimant. The Respondent countered this by saying that the Claimant gave them this flash drive and did not supervise them or give nay instruction as to its use. Furthermore, any allegation of criminality is outside the remit of the arbitrator.*" I must assume that these sentences misidentify the Parties, as the rest of this section states that it is the Claimant who discovered the document.

HORIZONS&CO الآفاق ومشاركوه

TO: China State Construction Engineering Corporation ME LLC
E-mail: antonina_slukina@chinaconstruction.ae

FROM: Horizons & Co Law Firm

DATE: 7 October 2021

SUBJECT: Legal Opinion: Non-Payment of Interim Payment Certificates.

Introduction

1. We refer to the Contract between China State Construction Engineering Corporation ME LLC and Ajman Holding LLC. Unless otherwise defined in this letter, terms and expressions defined in the Contract have the same meanings when used in this letter.
2. Items of particular note are **highlighted in bold.**
3. This letter is provided pursuant to the engagement between China State and Horizons & Co.
4. The provision of this opinion is not to be taken as implying that we owe a duty of care to anyone other than our client, in relation to the content of, and the commercial and financial implications of, the Contract Document, Mirkaaz Mall, Ajman, UAE, Main Works Package, dated 8 January 2018 (the "**Contract**"). This advice is provided solely for the benefit of the Client and for no other person or entity.
5. This letter sets out our opinion on certain matters of UAE law and contractual interpretation as currently applied by the courts of the UAE. We express no opinion on the law of any other jurisdiction. We have not made any investigation of, and do not express any opinion on, any other law.
6. For the purposes of this letter, we have examined:

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+٩٧١ ٤ ٣٥٤ ٤٤٤٤ +٩٧١ ٤ ٣٥٤ ٤٤٤٥

a. The Contract signed between Ajman Holding LLC ("**the Employer**") and China State Construction Engineering Corporation LLC ("**China State**", "**the Contractor**") on 8 January 2018.
b. Correspondence provided by China State on 29 September 2021 between China State, Ajman Holding LLC, and Funtastic Engineering Consultancy LLC, between February 2021 and September 2021.

Executive Summary

7. The Contractor arguably has a strong case in regards to the unpaid IPCs, as these have been acknowledged by the Employer as owing; these IPCs have been certified by the Engineer; and they have not in fact been paid. Furthermore, there does not appear to be a dispute as to this debt owed by the Employer.
8. The Contractor also arguably has a strong case in regards to financing charges. Financing charges appear to arise as a primary liability by way of contractual machinery, but out of an abundance of caution, the Contractor should also provide notice to the Engineer of these charges.
9. The Contractor appears to have effected a reduction in the rate of progress in the Works, factually since 22 April 2021 and effective under the Contract as of 10 May 2021. The Contractor appears to be exposed to liability for its reduction during the 18-day period between these two dates, when it was arguably non-compliant with the Contract for having reduced its rate of progress improperly.
10. The Contractor appears to have effected suspension of works on either 19 September 2021 or 26 September 2021. The Contractor factually suspended works on 1 September 2021. The Contractor appears to be exposed to liability for its suspension of works for either the 18-day or 25-day period between these dates, when it was arguably non-compliant with the Contract for having suspended work improperly.
11. Because of these periods of noncompliance, the Contractor faces exposure for giving inadequate notice under the Contract.
12. The email sent by Li Donghai on 17 August 2021 mentions, "*Agreed by Ajman Holding, CSCEC replaced it performance bond with security cheque*". Horizons & Co. do not have any further

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information regarding this matter, and if it is of concern to the Client, we encourage the client to provide further instructions.

13. The Contractor appears to have a good claim to bring before an arbitral tribunal. The Contractor must follow the contractually mandated procedure in bringing its claim before a tribunal. It is required (1) to send a Notice of Dispute to the Employer; and (2) to attempt amicable settlement with the Employer for a period of 14 days; and (3) only thereafter may it bring a claim. It is likely that the DIFC-LCIA Rules will apply to this arbitration, as prescribed by the contract. However, the government of Dubai has recently enacted Decree No. 34 of 2021, which may impose DIAC Rules on this arbitration in the future. The Contractor must be sensitive to time, that if it wishes to bring a claim under DIFC-LCIA Rules, it must do so before the new DIAC Rules are promulgated; this Opinion expresses no opinion as to which set of rules would be preferable, as the new DIAC Rules have not yet been promulgated or thus evaluated.
14. The Employer is arguably in breach of its obligations under Clause 2.4 (reasonable evidence regarding financing) and Clause 14.7 (payment of IPCs). The Contractor is arguably entitled to terminate its Contract with the Employer pursuant to Clause 16.2 of its Contract with the Employer in light of these breaches. The Contractor is also entitled to terminate its Contract under general principles of UAE law. The Contractor must give 14 days' notice to the Employer if it intends to terminate the Contract.

Opinion – Issue 1 – Reduction in Performance

Clause 16.1 – Contractor's Entitlement to Suspend Work
If the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], **the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment**, as the case may be and as described in the notice.

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The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [*Termination by Contractor*].

If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

(a) an extension of time for any such delay, if completion is or will be delayed. under Sub-Clause 8.4 [*Extension of Time for Completion*]; and

(b) payment of any such Cost, plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

15. The FIDIC contractual provisions cited above, a 21-day notice period is required before the Contractor can reduce its rate of work, unless it has received the Payment Certificate, reasonable evidence, or payment.
16. Although the Contract gives rise to an entitlement to reduce the rate of works and/or to suspend works, the present case evinces ambiguity as to whether reduction of rate of performance was properly effected. In particular, it is ambiguous and possibly unlikely that the Contractor gave the Employer proper notice as to its intention to reduce its rate of performance.
    a. The Contractor's email on 28 March 2021 reminded the Employer of its obligations under IPC #36, but did not announce the Contractor's intention to reduce the rate of performance.

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b. The Contractor's letter to the Employer on 4 April 2021 stated that the payment was overdue, and that the Contractor would not be responsible for delay due to this pursuant to Clauses 8.4 (EOT) and 16.1 (quoted above). However, although no formality requirement is present in the Contract, this letter did not carry the appearance or announcement of a notice, and was ambiguous in its intended effect. Disclaiming responsibility is readily distinguished from evincing an intention to reduce the rate of progress on works.

c. The Employer's email to the Contractor on 5 April 2021 appears to interpret the 4 April 2021 letter to the Employer as notice pursuant to Clause 16.1, stating that the non-payment of IPC #36 four days earlier had not met the contractual requirement of 21 days. It must be noted that this point was not, in the documents provided to Horizons & Co., specifically addressed by the Contractor in subsequent correspondence.

d. The Contractor's email to Horizons & Co. dated 4 October 2021 indicates the Contractor was and is under the belief that it had effect a reduction of the rate of progress on 22 April 2021, i.e., 21 days from 1 April, the date that IPC #36 had not been paid. Although the Employer, in its email on 5 April 2021, appears to acknowledge that a reduction would have been permissible at the date of 22 April 2021, it does not appear that notice itself was effected on 1 April.

e. The Contractor's letter to the Employer on 19 April 2021 indicates an intention to reduce the rate of work from 22 April 2021. This letter therefore did not effect notice of 21 days effective 22 April 2021. However, the language of this letter states that it was "*hereby notifying*" that the rate of works would be reduced from 22 April 2021. 21 days from 19 April 2021 was 10 May 2021. **By notifying on 19 April 2021, and factually reducing works from 22 April 2021, it is arguable that the Contractor was in breach of contract for 18 days, and that the Contractor legitimately has reduced works from 10 May 2021 onwards.**

f. The Contractor's letter dated 29 April 2021 contains language from which an inference of a reduction can readily be made. The Employer was at this point arguably on notice that the reduction had taken place. In its letter dated 1 June 2021, the Contractor used

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language indicating the existence of a reduction ("*albeit at a reduced rate*"). Similarly, in its letter to the Employer dated 5 August 2021, the Contractor used language indicating the existence of a reduction ("*may continue the work at a reduced rate of works…*").

17. It is therefore arguable that the Contractor has factually reduced works since 22 April 2021, was in breach of contract from 22 April 2021 to 9 May 2021, and has reduced works in a manner sanctioned by the Contract since 10 May 2021. **This creates exposure for the Contractor for this period of breach**.

Opinion – Issue 2 – Alternative Payment Arrangements

Clause 2.4 – Employer's Financial Arrangements
The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.

18. Pursuant to Clause 2.4 of the Contract, the Employer had a duty to provide the Contractor reasonable evidence of its financial arrangements. The purpose of this clause is to ensure that the Contractor would be able to arrange its own financial affairs with a reasonable assurance as to future payments to be received from the Employer.
19. On 5 April 2021, the Employer indicated that "*payment of IPC 36 is under process and to be released shortly*," which indicates at most a then-current intention to release payment to the Contractor.
20. On 27 May 2021, the Contractor requested from the Employer reasonable evidence of a financial arrangement, pursuant to Sub-Clause 2.4 of the General Conditions of the Contract.

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21. On 13 June 2021, the Employer wrote an email to the Contractor stating that, "*our tentative payment plan is… payment to bill no 36, 37, & 38 will be settled by the end of June*". It also stated that its discussions with its bank "*whilst very well advanced and positive, will only be finalized this coming week pending a final executive management meeting and we will keep you posted if there is any changes in the above mentioned plan*."
22. The Contractor wrote to the Employer on 23 June 2021 repeating the sentence (without context) "*Payment to bill no 36, 37, & 38 will be settled by the end of June.*" Then the Contractor stated that based on this promise, the Contractor had committed to the plans of its subcontractors and suppliers.
23. Finally, on 17 August 2021, the Contractor wrote to the Employer, mentioning a meeting that took place on 4 July 2021 and memorializing the discussion that took place at the meeting held on 11 August 2021. At this meeting, the Parties discussed new negotiations regarding project finance with CBD, a bank; discussions with "His Highness" regarding funding; the release of a payment of between AED 3 and 5 million; and supply chain disruptions due to lack of payment
24. Analysis of this can go two ways:
    a. First, it is clear that the Employer was under a duty under Clause 2.4 to provide the Contractor assurances of its financial health by way of reasonable evidence. No evidence has been provided that the Employer performed that duty. Furthermore, the Employer repeatedly assured the Contractor of its ability and willingness to pay monies owed, and indeed apparently induced the Contractor to rely on these assurances. This indicates that the assurances provided to the Contractor were at least to some extent convincing, whether or not they were reasonable. **In either interpretation, the Employer breached its duty under Clause 2.4: either it simply failed to provide reasonable evidence, or it provided evidence that was not reasonable**.
    b. Second, it is conceivable that the assurances made by the Employer supplemented the provisions of the Contract, or created a separate contract. In this regard, it must first be noted that such an agreement would still be covered by the arbitration clause under Clause 20.2 ("*arising out of or in connection with*"). Furthermore, it must be noted that the parameters of such an agreement are poorly defined on the record as provided to

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Horizons & Co. The Employer's letter dated 5 April 2021 indicates nothing more than a present intention, not an intention to form a new agreement. In particular, the precatory and outright aspirational language used by the Employer in its 13 June 2021 email must be noted. The record, such as it is, of the 11 August 2021 meeting again indicates aspiration, rather than any conclusive agreement. That the Contractor chose at this stage to rely on these assurances is unfortunate, but **it is unlikely that a separate, collateral agreement will be found without further, and considerably more substantial, evidence. Horizons & Co. therefore require further instruction in order to provide fuller advice, and China State are encouraged to provide as much documentation in regards to these events as possible. At the very least, this was an acknowledgment of debt by the Employer.**

Opinion – Issue 3 – Suspension of Works

Clause 16.1 – Contractor's Entitlement to Suspend Work
If the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], **the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment**, as the case may be and as described in the notice. The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [*Delayed Payment*] and to termination under Sub-Clause 16.2 [*Termination by Contractor*]. If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

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If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to: (a) an extension of time for any such delay, if completion is or will be delayed. under Sub-Clause 8.4 [*Extension of Time for Completion*]; and (b) payment of any such Cost, plus reasonable profit, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

25. Clause 16.1 is repeated in full.
26. Analysis of suspension of works under the Contract is similar to that in regards to reduction of works. 21 days' notice was required to effect suspension of work under the contract, unless the Payment certificate, reasonable evidence, or payment were received.
27. UAE law also provides strong protection to contractors who suspend work for non-payment of claims:

UAE Civil Code, Article 247
In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do.

28. As a matter of general principle, a failure by one party to perform its part of a mutual obligation releases the other from any corresponding obligation. The Dubai Cassation, Case No. 90/1995 dated 5 November 1995, found:

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> *"It is established in binding agreements that each party may, if corresponding obligations are outstanding, decline to perform its obligations if the other party fails to perform its obligation. This means that a purchaser may withhold the purchase price even if it was due and payable, until the seller has performed the corresponding obligation, unless the purchaser has waived such right after it accrued or if the contract contains a provision preventing the purchaser from applying such right."*

29. In its 4 April 2021 letter, the Contractor stated that it would not be responsible for suspension of performance. Such did not effect suspension of the Works. This was stated in the Employer's correspondence of 5 April 2021, in which the Employer reiterated the provisions of Clause 16.1 and the 21-day notice requirement.
30. In its letter dated 1 June 2021, the Contractor used language indicating the prospect of a suspension ("*Under these worsening circumstances the Contract is required under the contracts terms sub clause 16.1 to notify the Employer that after 21 days suspension of the works may be necessary should overdue payment not be received*."). On 27 June 2021, the Contractor sent a letter to the Employer stating that it "*must consider actions available as stipulated under the Conditions of Contract Sub-Clause 16.1…*" On 5 August 2021, the Contractor wrote to the Employer stating it "*may suspend the works…*" None of these effected the suspension of contract works.
31. On 30 August 2021, the Contractor sent a letter to the Employer in which it stated that it "*regretfully have no other choice but to suspend the Work per Ref: CSCECME/MM/PD-AH/2021/065 in accordance with Sub-Clause 16.1 of the Conditions of Contract. The suspension of works will start from 01st September 2021*." The earlier letter cited has not been provided to Horizons & Co.
32. On 6 September 2021, the Contractor sent the Employer a letter that stated they "*hereby inform that the Work is suspended effective from 1st September 2021 in accordance with Sub-Clause 16.1 of the Conditions of Contract*."
33. The following analysis proceeds ignoring the earlier letter, which is requested from the Contractor's representatives.

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34. No formality requirements are found in the (modified) FIDIC contract that forms the basis of the Parties' Contract. No guidance in relation to the 1999 FIDIC contract implies any formality. UAE law does not provide for formality in regards to the suspension of construction works or anything similar (e.g., Arts 19, 146(2), 193, 210, 471). Finally, the rules of the DIFC-LCIA do not require formality in this regard.
35. It is therefore arguable that the Contractor effected notification of suspension on 30 August, and thus was validly suspending works on 20 September 2021. **If this is the case, the Contractor was non-compliant with the Contract for 19 days, from 1 September 2021 to 19 September 2021.**
36. In the event that the words, "*hereby inform*" carry special weight, then the Contractor effected notification of suspension on 6 September 2021, and was validly suspending works on 27 September 2021. **If this is the case, the Contractor was non-compliant with the Contract for 26 days, from 1 September 2021 to 26 September 2021**.
37. **It is therefore arguable that the Contractor validly suspended works, but in both scenarios documented to Horizons & Co., the Contractor was non-compliant with the Contract for a period of time. This creates exposure for the Contractor**.

Opinion – Issue 4 – Claim for Unpaid Interim Payment Certificates

Clause 14.3 – Application for Interim Payment Certificates
The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [*Progress Reports*]. The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed:

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1. The estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including the Variations but excluding items described in sub-paragraphs (b) to (g) below);

2. Any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.8 [*Adjustments for Changes in Cost*];

3. Any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender;

4. Any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [*Advance Payment*];

5. Any amounts to be added or deducted for Plant and Materials in accordance with Sub-Clause 14.5 [*Plan and Materials intended for the Works*];

6. Any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*]; and

7. The deduction of amounts certified in all previous Payment Certificates.

Clause 14.6 – Issue of Interim Payment Certificates
No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

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However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Engineer shall give notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:

(a) If any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or

(b) If the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent, or satisfaction.

Clause 14.7 – Payment (as amended)

The Employer shall pay to the Contractor:

(a) the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [*Performance Security*] and Sub-Clause 14.2 [*Advance Payment*]. whichever is later;

(b) [*The employer shall pay the Contractor, the amount certified in each Interim Payment Certificate within 30 days after certification*]; and

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(c) the amount certified in the Final Payment Certificate within 56 days after the employer received the employment certificate.

Payment of the amount due in each currency shall be made into the bank account, nominated by the Contractor. in the payment country (for this currency) specified in the Contract.

38. The position under UAE law in regards to payment certificates is straightforward. Ordinarily, a claimant has the burden of proving the existence of a debt, and thereafter the burden shifts to a defendant to prove that the debt has been discharged. However, there is a presumption that payment is due in respect of an amount included in a payment certificate issued by a consultant. (Dubai Cassation No. 167/1998 dated 6 June 1998.) A contractor is not similarly bound by a consultant's certificate. (Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010).
39. In the present case, the Engineer has certified Interim Payment Certificates 36-42 in the schedule below.
    a. Interim Payment Certificate #36 including VAT due 1 April 2021 AED 9,704063.07
    b. Interim Payment Certificate #37 including VAT due 1 May 2021 AED 7,057,910.06
    c. Interim Payment Certificate #38 including VAT due 2 June 2021 AED 7,537,702.69
    d. Interim Payment Certificate #39 including VAT due 2 July 2021 AED 4,181,788.85
    e. Interim Payment Certificate #40 including VAT due 1 August 2021 AED 2,254,859.65
    f. Interim Payment Certificate #41 including VAT due 1 Sept 2021 AED 2,372,200.78.
    g. Interim Payment Certificate #42 including VAT due 1 Oct 2021 AED 2,396,232.70.
40. The Client is requested to confirm these figures, and confirm that IPCs #41 and #42 have been certified.
41. In subsequent correspondence, it appears that the Employer has acknowledged its debt to the Contractor. On 5 April 2021, the Employer wrote to the Contractor and stated that IPC #36 was being processed for payment. On 13 June 2021, the Employer wrote to the Contractor, discussing a "*tentative payment plan*" and "*payment to bill no 36, 37, & 38 will be settled by the end of June.*" Whether or not these statements create new or collateral contractual relations (discussed *supra*) does not affect their character as acknowledgement of debt.

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42. **No evidence has been presented to Horizons & Co. to rebut the presumption in favour of the Contractor. It is unknown what evidence would be capable of rebutting this presumption. The fact that these debts have been certified by way of Interim Payment Certificate appears to indicate that the Employer has acknowledged these IPCs as debts. The Employer's own statements appear to acknowledge its debts. That the Contractor is owed these sums of money appears to be proven strongly. Therefore, this issue does not appear to be in dispute; rather, it is the non-payment of these debts that is the principal source of dispute in the present case.**
43. An arbitral tribunal would be well positioned to dispose of this issue.

Opinion – Issue 5 – Claim for Financing Charges

Clause 14.8 – Delayed Payment
If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [*Payment*], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [*Payment*], irrespective (in the case of its sub-paragraph (b) of the date on which any Interim Payment Certificate is issued. Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency. The Contractor **shall be entitled to this payment without formal notice or certification,** and without prejudice to any other right or remedy.

44. It is clear that Clause 14.8 provides an *express contractual entitlement* to financing charges. Such award, if valid, is not at the discretion of an arbitral tribunal.
45. It is the understanding of Horizons & Co that FIDIC Clause 14.8 does not of fend Islamic principles or is not in the UAE adjudged so to do; rather, interest is permitted on the basis that it represents

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compensation for "*presumed*" damage for delaying payment in breach of an obligation (Federal Supreme Court No. 371/18 dated 30 June 1998, 332/21 dated 25 September 2001 and 371/21 dated 24 June 2001).

46. Furthermore, as Clause 14.8 provides an express contractual entitlement to financing charges, it is submitted that such entitlement is not in the way of damages or extracontractual or ancillary or additional charges. **As such, it is arguable that the financing charges for delayed payment under Clause 14.8 do *not* fall under Clause 20.1**.

Opinion – Issue 6 – Claims

Clause 20.1 – Contractor's Claims
If the Contractor considers himself to be entitled to any extension of the Time for Completion **and/or any additional payment**, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than [14] days after the Contractor became aware, or should have become aware. of the event or circumstance. If the Contractor fails to give notice of a claim within such period of [14] days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply. The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance. The Contractor shall keep such contemporary records as may be necessary to substantiate any claim. either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary

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records. The Contractor shall permit the Engineer to inspect all these records. and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim. or within such other period as may be proposed by the Contractor and approved by the Engineer. the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

a) this fully detailed claim shall be considered as interim:

b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed. and such further particulars as the Engineer may reasonably require: and

c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance. or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

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> The Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*] and/or (ii) the additional payment (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

47. There is a tension between Clause 14.8 and Clause 20.1 in that Clause 20.1 due to the presence of the words "*and/or any additional payment*" in Clause 20.1.
48. It is conceivable that a tribunal could find that a claim under Clause 14.8 falls within Clause 20.1, as it constitutes an "*additional payment*". The processing of financing charges under Clause 14.8 is not found within Clause 14.7.
49. Against this might be said:
    a. The rule of interpretation known as *noscitur a sociis* holds that a word will be judged in its context, by reference to the words around it. The context here are the words "extension of the Time for Completion" and "event or circumstance" giving rise to the claim for EOT. Non-payment of moneys owing is an event or circumstance only in the barest manner and hardly requires evaluation by an Engineer.
    b. The word "*additional*" implies that the payment is in addition to something, presumably the sums due under the contract, just as an extension of time is an extension of time due under the contract.
    c. Clause 14.8 states, "***The Contractor shall be entitled to this payment without formal notice or certification,*** *and without prejudice to any other right or remedy*." The provisions of Clause 20.1 explicitly envision formal notice, e.g., "*the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim*"; "*the Engineer may, after receiving any notice under this Sub-Clause*..."; etc. These provisions would appear to defeat the explicit language of Clause 14.8 if payment under Clause 14.8 had to be noticed to the Engineer.

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50. It is therefore arguable that the Contractor need not make an application or file notice with the Engineer in regards to any claim under Clause 14.8 for financing charges. However, the Contractor is advised to make such a claim out of an abundance of caution, if the Contractor's finances permit as such.

Opinion – Issue 7 – Arbitration and Jurisdiction

Clause 20.2 (inserted by Particular Conditions) – Arbitration
Any dispute or difference arising out of or in connection with this agreement including any question regarding its existence, validity, or termination, shall be firstly settled amicably within 14 days from the date of the dispute being notified in writing by either party, unless settled amicably, the dispute shall be finally resolved by arbitration under the Arbitration rules of the DIFC-LCIA arbitration centre which rules are deemed to be incorporated by reference to this clause. The number of arbitrators shall be three. The seat or legal place of arbitration shall be Dubai International Financial Centre, Dubai, UAE. The language used in the arbitration shall be English.

51. This arbitration clause is straightforward.
52. First, the breadth of its jurisdiction must be noted: "*any dispute or difference arising out of or in connection with this agreement*". This jurisdiction includes the possible matter of a side or collateral agreement that has arisen in regards to assurances made by the Employer in regards to its financing arrangements in May, June, and August 2021.
53. This arbitration clause contains the standard elements of an arbitration clause:
    a. The arbitration will likely be resolved under the arbitration rules of the DIFC-LCIA. Decree No. 34 of 2021, which abolishes the DIFC-LCIA Arbitration Centre and amalgamates it into the DIAC, has introduced uncertainty in regards to the rules that apply to arbitrations. In regards to existing arbitrations, the rules chosen will continue unaffected; however, in regards to new arbitrations, DIAC Rules will apply. It is a general principle of arbitration

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law that the parties are able to choose their own rules, and it appears that the Parties in the present case have already elected to use DIFC-LCIA Rules, which will continue to exist as a historical document; however, arbitration in the present case has not yet been filed. It has been announced that DIAC will soon introduce new rules reconciling it with the Decree; it is at a minimum expected that if parties file a new arbitration electing to use DIFC-LCIA Rules before the new DIAC Rules are promulgated, that election will be given effect. However, uncertainty exists as to whether parties will be allowed to elect to use DIFC-LCIA Rules after the new DIAC rules are promulgated. It is believed that the new DIAC Rules will follow UNCITRAL principles. None of this should be alarming to the client: it is unlikely that a change in rules will affect substantive outcomes; the UNCITRAL Rules are well known and trusted; and it is likely that the parties will be allowed to elect to use DIFC-LCIA Rules after the promulgation of the new DIAC Rules.

b. There shall be three arbitrators.

c. The seat of arbitration shall be the DIFC.

d. The language of the arbitration shall be English.

54. It should be noted again that the governing law of the Contract is that of the United Arab Emirates. This law will govern how the substantive terms of the Contract are interpreted.

55. Of critical note is the process by which arbitration is commenced:

a. First, the Contractor must notify the Employer of a dispute. It is by the letter provided in addition to this Opinion that the Contractor will fulfil this requirement.

b. Over the next 14 days, the Contractor must attempt to resolve the dispute amicably with the Employer. The Contractor must provide evidence in writing as to its attempts to amicably resolve its dispute as a precondition to arbitration.

c. After 14 days, the Contractor may initiate arbitration. Pursuant to Decree No. 34 of 2021, the arbitration will be administered by DIAC, seated in the DIFC.

56. Failure to follow this process may result in the Tribunal ruling that it lacks jurisdiction to hear the dispute.

57. **If the Contractor wishes to commence arbitration, it must strictly follow the process outlined above. Given that the promulgation of new DIAC Rules is expected shortly, if the Contractor**

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wishes to have its dispute heard under DIFC-LCIA rules, the Contractor faces potential exposure and is encouraged to commence this process presently.

Opinion – Issue 8 – Termination

Clause 16.2 – Termination
The Contractor shall be entitled to terminate the Contract if: (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [*Contractor's Entitlement to Suspend Work*] in respect of **a failure to comply with Sub-Clause 2.4** [*Employer's Financial Arrangements*]; (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate; (c) **the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [*Payment*] within which payment is to be made** (except for deductions in accordance with Sub-Clause 2.5 [*Employer's Claims*]); (d) **the Employer substantially fails to perform his obligations under the Contract**; (e) the Employer fails to comply with Sub-Clause 1.6 [*Contract Agreement*] or Sub-Clause 1.7 [*Assignment*]; (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [*Prolonged Suspension*]; or (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any

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act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, **the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract**. However, in the case of subparagraph (f) or (g), the Contractor may by notice terminate the Contract immediately.

The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.

58. According to the provisions of the Contract, the Contractor may terminate the Contract upon 14 days' notice.
59. In the present case, the Contractor has multiple grounds upon which to terminate its Contract with the Employer:
60. The Employer has not provided reasonable evidence of financial arrangements, pursuant to Clause 2.4.
61. The Contractor has not received payment under IPCs 36-42 within 42 days after the expiry of the time stated in Sub-Clause 14.7.
62. The Employer has substantially failed to perform its obligations under the Contract by providing no evidence that it is capable or willing to pay the sums of money owed to the Contractor.

Civil Code – Article 271

The parties may agree that in case of non-performance of the obligations deriving from the contract, the contract will be deemed to have been "ipso facto" without need to obtain a court order. Such an agreement does not release the parties from the obligation of serving a formal notification, unless the parties agree that such notification is dispensed with.

63. Article 271 of Federal Law No. 5/1985 provides that the parties can agree for a contract to be terminated, in the event of non-performance by one of the parties, without the need to obtain

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a court order. However, Article 271 of Federal Law No. 5/1985 expressly mandates that the party claiming termination must serve formal notice, unless the parties have stipulated otherwise in their contract.

64. Article 271 confirms the Contractor's right to terminate its contract, and confirms that notice must be given to the Employer. **The Contractor must document its attempts at amicable settlement and must give the Employer 14 days' notice**.

Article 274 – Effects of Contract's Dissolution
When a contract is or shall be rescinded, the two contracting parties shall be reinstated to their former position, prior to contracting, and in case this is impossible, the Court may award damages.

65. Under UAE law, damages are available upon termination. The Contractor will have a case for damages if damages can be proved.
66. Under UAE law, it has also been held that as a construction contract is a continuing contract termination does not affect the parties' accrued rights, including the right to be paid for work performed, which are not extinguished on termination. (Abu Dhabi Cassation No. 293/3 dated 27 May 2009, Dubai Cassation No. 50/2008 dated 27 May 2008 and Federal Supreme Court No. 213/23 dated 8 June 2003.)
67. As such, termination will not affect the Contractors rights to be paid under IPC 36-42. This is provided for by both the Contract and by general principles of UAE law.
68. The Contract deals with payments and other matters after termination.

Clause 16.3 – Cessation of Work and Removal of Contractor's Equipment
After a notice of termination under Sub-Clause 15.5 [*Employer's Entitlement to Termination*], Sub Clause 16.2 [*Termination by Contractor*], or Subclause 19.6 [*Optional Termination, Payment and release*] has taken effect, the Contractor shall promptly:

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(a) Cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works; (b) Hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and (c) Remove all other Goods from the Site, except as necessary for safety, and leave the Site.

69. These provisions are self-explanatory and logical.

Clause 16.4 – Payment on Termination
After a notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] has taken effect, the Employer shall promptly: (a) Return the Performance Security to the Contractor; (b) Pay the Contractor in accordance with Sub-Clause 19.6 [*Optional Termination, Payment and Release*], and (c) Pay the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination.

70. Sub-Clause 19.6 refers to *force majeure* provisions and is not relevant.
71. Sub-Clause 16.4(c) provides a contractual claim for damages, to be read along with the legislative provisions cited above. This clause does not affect the accrued rights to payment under the IPCs discussed above.

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Options Available to Contractor

72. Based on the foregoing, we are of the opinion that the Contractor has several options open to it.
73. The Contractor should issue a formal Notice of Dispute using language that indicates such. This proposed letter accompanies this Opinion.
74. The Contractor should consider its position and note its potential exposure in regards to its earlier notice of reduction of works and its earlier notice of suspension, and this will be a major focus of any defence raised by the Employer to these claims.
75. The Contractor must follow the proper procedure in bringing a claim for arbitration including evidenced genuine efforts to solve this matter amicably for 14 days before filing a request for arbitration. This is a condition precedent to the Arbitration.
76. Possible claims in Arbitration include:
    a. Pursuant to Clause 14.7, refer the claim for breach of payment clause, i.e., the non-payment of certified sums of money from 36 to 42. We have identified the issue surrounding inadequate notice of the reduction of works in the letter of 19 April 2021 but can make an argument that notice was effective 21 days from the 19th April 2021. We could attempt to make an argument that notice was not necessary due to knowledge by the Employer of the hardship caused to the Contractor in earlier correspondence including 4 April 2021 but this weaker argument would have to be substantiated by evidence of the hardship including claims, expenses or notices sent by the suppliers to the contractor.
    b. Pursuant to Clause 14.8, claim financing charges.
    c. Pursuant to Clause 2.4, claim there is a failure to provide evidence of financial arrangements.
    d. Associated costs.
77. Claim in arbitration that the meeting of 31 May 2021 amended the payment terms by creating a new obligation to pay IPCs # 36, 37, and 38 by the end of June and that this amendment of terms is a separate ground of contractual liability. As stated, this argument is arguable but not strong.

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78. The Contractor should articulate its position regarding the performance bond and guarantee cheque, and the consequences that arbitration and termination will have in regards to them.
79. The Contractor may terminate its Contract with the Contractor by giving 14 days' notice and clearly evincing an intention to terminate.

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Appendix: Narrative

1. On 28 February 2021, the Engineer wrote to the Contractor rejecting its revised programme, noting an inconsistency between the software the Contractor was using to evaluate its progress and observations on-site. This includes submission of low-value IPCs and inadequate resources, and recommends increasing resources. (Exhibit 1)

2. Also on 28 February 2021, the Engineer wrote to the Contractor, rejecting its claim for force majeure as it had not been notified within 14 days of becoming aware of the event. (Exhibit 2)

3. On 7 March 2021, the Engineer wrote to the Contractor, reiterating its belief that the Contractor's methodology to evaluate its progress was flawed, and requesting that it deploy more resources. (Exhibit 3)

4. On 22 March 2021, the Engineer wrote to the Contractor, stating that its revised programme was insufficient, as it only discussed the completion date, not sequencing or the method of preparation, and reiterating its belief that progress had not been achieved. (Exhibit 4)

5. On 28 March 2021, the Contractor wrote to the Employer stating that Interim Payment Certificate #36 was due, in a sum of AED 9,704,063.07. (Exhibit 1) On 4 April 2021, the Contractor wrote to the Employer stating that IPC #36 had not been paid, and therefore that it could not pay its subcontractors. The Contractor instructed the Employer to pay immediately in order to avoid interruptions, and stated that it would not be responsible for delays, reductions in performance, and suspension of performance. (Exhibit 5)

6. On 4 April 2021, the Engineer wrote to the Contractor, stating that the force majeure issue had already been dealt with in the February 2021 correspondence. (Exhibit 6)

7. On 4 April 2021, the Contractor wrote to the Employer stating that IPC #36 was overdue, and that it would not be held liable for reduction or suspension of the Works. (Exhibit 7)

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8. On 5 April 2021, the Employer wrote to the Contractor, stating that it had given only 4 days' notice, but that 21 days' notice was needed to effect suspension of works properly under the contract. (Exhibit 8)

9. On 18 April 2021, the Engineer wrote to the Contractor, stat that it had not provided a sufficient revised programme; it had declined to provide information regarding critical MEP testing and commission. (Exhibit 9)

10. On 19 April 2021, the Contractor wrote to the Employer stating that it was unable to pay its subcontractors and suppliers due to the Employer's non-payment, and that it would reduce the rate of works from 22 April 2021. It also reminded the Employer that the Employer would be liable for remobilization delays and costs. (Exhibit 10)

11. On 22 April 2021, the Contractor wrote to the Engineer to explain to the Engineer that the delay in the payment under IPC #36 would create Risk Event #17, and that it would analyse the intermediate and final impact. (Exhibit 11)

12. On 29 April, the Engineer responded to the claimant, stating that it would await details regarding impact. It reiterated that the Contractor was required to demonstrate demobilization after 22 April 2021 in order to demonstrate remobilization. (Exhibit 12)

13. On 29 April 2021, the Contractor wrote to the Employer, stating that IPC #36 was overdue and that IPC #37 was now due. The Contractor requested that the Employer release both IPC #36 and PIC #37 "*to enable Contractor to resume normal working as soon as is reasonably practicable*." (Exhibit 13)

14. On 4 May 2021, the Contractor wrote to the Engineer, enclosing an Interim Delay Impact Report, in which it outlines delays to MEP works, ID works, and others. It also noted manpower reductions. (Exhibit 14)

15. On 9 May 2021, the Engineer wrote to the Contractor, acknowledging the revised programme, but also stating that a revised programme had been required of the Contractor in February 2021. (Exhibit 15)

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16. On 20 May 2021, the Contractor wrote to the Engineer, providing an extensive Extension of Time for Completion claim with a deficit of 64 days. In this document, the Contractor repeated the correspondence cited above to show that it had been unable to release overdue payments to subcontractors and suppliers. (Exhibit 16)

17. On 23 May, the Engineer wrote to the Contractor, stating that once the delay event was concluded and upon submission of final claim substantiation, it would engage in claim analysis. (Exhibit 17)

18. On 27 May 2021, the Contractor wrote to the Employer to request that it provide reasonable evidence of financial arrangement, pursuant to Sub-Clause 2.4 of the General Conditions of Contract. (Exhibit 18)

19. On 1 June 2021, the Contractor wrote to the Employer, stating that PICs # 36, 37, and 38 had not yet been received. It also stated that it had used up and that it had reduced its rate of work. **It cited Clause 16.1, regarding the 21-day notice requirement, but did not invoke it.** (Exhibit 19)

20. On 6 June 2021, the Contractor wrote to the Engineer, citing the failure of the Employer to pay PICs #36, 37, and now 38, attaching Interim Delay Impact Report #2 (Exhibit 20)

21. On 7 June 2021, the Engineer wrote to the Contractor, stating that its Delay Impact Report #2 was non-specific in nature and required a factual quantitative record. (Exhibit 21)

22. On 13 June 2021, the Employer wrote an email to the Contractor, stating that "*our tentative payment plan is… payment to bill no 36, 37, & 38 will be settled by the end of June*". It also stated that its discussions with its bank "*whilst very well advanced and positive, will only be finalized this coming week pending a final executive management meeting and we will keep you posted if there is any changes in the above mentioned plan*." (Exhibit 22)

23. On 15 June 2021, the Contractor wrote to the Engineer including a detailed, if not fully explicated factual record. (Exhibit 23)

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24. On 20 June 2021, the Contractor wrote to the Engineer, including its Extension of Time #10, detailing Delay Event #17, providing an extensive Extension of Time for Completion claim with a deficit of 97 days. (Exhibit 24)

25. On 23 June 2021, the Contractor wrote to the Employer repeating the sentence (without context) "*Payment to bill no 36, 37, & 38 will be settled by end of June*." Then the Contractor stated that based on this promise, the Contractor had committed to the plans of its subcontractors and suppliers. (Exhibit 25)

26. On 27 June 2021, the Contractor wrote to the Employer, stating that it was running out of essential supplies, that its equipment and plant were exposed, and that it had exhausted all methods for continuing work. (Exhibit 26)

27. On 12 July 2021, the Engineer wrote to the Contractor, stating that it was not in control of the release of funds, nor recommend the release of the Contractor's staff. All it could do was to recommend it rationalize its staff-to-labour ratios and submit them to the Engineer. (Exhibit 27)

28. On 12 July 2021, the Contractor wrote to the Engineer requesting advice regarding the termination of staff in order to mitigate its costs, despite creating prolongation costs later on. (Exhibit 21) On 13 July 2021, the Contractor sent a nearly identical letter to the Employer (Exhibit 28)

29. On 13 July 2021, the Contractor wrote a letter to the Employer stating that it had submitted a claim for EOT to the Engineer, and requesting the Employer's guidance regarding overhead costs, specifically related to manpower and whether it should reduce its staffing levels. (Exhibit 29)

30. On 18 July 2021, the Contractor wrote to the Engineer, including a revised Interim Extension of Claim, with a deficit of 126 days. (Exhibit 30)

31. On 18 July 2021, the Engineer wrote to the Contractor, stating that its claim was an ongoing event, and that it would review the final EOT claim when received. (Exhibit 31)

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32. On 25 July 2021, the Contractor wrote to the Engineer, again seeking advice regarding staffing and mobilization. (Exhibit 32)

33. On 26 July 2021, the Engineer wrote to the Contractor, deflecting its queries. It stated that commercial decisions were for the Contractor to decide. It stated that if the Employer had stated the project was overstaffed, it should follow that advice. (Exhibit 33)

34. On 5 August 2021, the Contractor wrote to the Employer, noting that now four IPCs had not been paid, stating that it may suspend or reduce its work. (Exhibit 34)

35. On 17 August 2021, the Contractor wrote to the Employer, mentioning a meeting that took place on 4 July 2021 and memorializing the discussion that took place at the meeting held on 11 August 2021. At this meeting, the Parties discussed new negotiations regarding project finance with CBD, a bank; the Contractor replaced its performance bond with a security cheque; discussions with "His Highness" regarding funding; the release of a payment of between AED 3 and 5 million; and supply chain disruptions due to lack of payment (Exhibit 35)

36. On 18 August 2021, the Contractor wrote to the Engineer, including a revised Interim Extension of Claim, with a deficit of 156 days. (Exhibit 36)

37. On 30 August 2021, the Contractor wrote to the Employer, stating that IPCs #36-40 were now overdue, that IPC #41 was due, and that a cumulative payment of AED 33,108,525.10 was now due. It stated that it would exercise its rights under Clause 16.1 and suspend works from 1 September 2021. (Exhibit 37)

38. On 6 September 2021, the Contractor sent a letter to the Employer, informing the Employer of its suspension of work on 1 September 2021. It stated that during the reduction period (misstated as the suspension period) it had sought to maintain essential works. It noted that the Employer had not responded to its letters regarding staffing. Finally, it mentioned there had been no follow up regarding finance due mid-September. (Exhibit 38)

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Date of BA/BS	**May 2019**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 6, 2023**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ryan Tsivitse

1833 Cloverdale Drive • Rochester, MI 48307 • (248) 568-3183 • rptsivit@iu.edu

June 25, 2023

The Honorable Bess M. Parrish Creswell
Judge, United States Bankruptcy Court
Middle District of Alabama
One Church Street
Montgomery, Alabama 36104

Dear Judge Creswell:

I am writing to apply for a clerkship with your chambers beginning in September 2024. I graduated from the Indiana University Maurer School of Law this past May, and I hope to have the opportunity to work in your chambers. I am interested in a bankruptcy clerkship because as a graduate who is pursuing a career in bankruptcy law, clerking in your chambers would significantly improve my knowledge of bankruptcy law. Bankruptcy is an area of law that I enjoyed exploring during my time as a summer law clerk, and it is an area that I hope to learn more about and eventually practice in my future career. I want to work in the area of bankruptcy law because I want to learn more about the processes of litigation and working through complicated legal issues that businesses and individuals need help solving.

Although I am from Michigan, I spent both of my law school summers in Alabama. Following my first year of law school, I worked in Birmingham as a legal intern at Autocar, LLC, where I researched and wrote about how changing laws across multiple states in areas such as employment law and franchise law affected employees and the company. Last summer, I was a summer law clerk at Burr & Forman, where I drafted transactional documents and did research and writing in a variety of areas of law, including financial services and bankruptcy. This August, I will begin a one-year judicial clerkship for a state trial court judge in New Jersey, where I hope to further improve my legal research and writing skills.

Throughout law school, I improved my writing skills by taking classes that have made my writing clear and concise. As a member of my law school's flagship journal, the *Indiana Law Journal*, I developed skills that are essential for lawyers, including paying attention to detail as an associate editor and reviewing legal writing as an articles editor. I have also served my community by volunteering with the student organization Outreach for Legal Literacy, through which I taught local elementary students lessons in government and law.

A clerkship in your chambers would be an invaluable opportunity to learn more about the laws of bankruptcy. I would be a reliable clerk who would serve your chambers with integrity. I would welcome the opportunity to interview with you, and I look forward to hearing from you. Thank you for your time and consideration.

Best Regards,

Ryan Tsivitse

Ryan Tsivitse

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EDUCATION

Indiana University Maurer School of Law — Bloomington, IN
Juris Doctor, GPA: 3.519 — Spring 2023

- Full-Tuition Merit-Based Scholarship Recipient
- Dean's Honors (Spring 2021, Spring 2022, Fall 2022)
- Articles Editor, *Indiana Law Journal* (Spring 2022-Spring 2023)
- Associate, *Indiana Law Journal* (Fall 2021-Spring 2022)
- Academic Achievement Award (Summer 2021)
- Treasurer, Business & Law Society (Spring 2021-Spring 2022)
- Member, Outreach for Legal Literacy (Fall 2020-Spring 2023)

Michigan State University James Madison College — East Lansing, MI
Bachelor of Arts, International Relations, GPA: 3.48 — Spring 2019

EXPERIENCE

University of Manchester
Research Assistant — Spring 2023

- Collaborated with University of Manchester professors Michael Galanis and Vincenzo Bavoso
- Wrote research memoranda regarding short selling and the short squeeze of "meme stocks"

Indiana University Maurer School of Law — Bloomington, IN
Research Assistant for Executive Associate Dean Donna Nagy — Summer 2022-Winter 2022

- Proofread and cite checked chapters of a securities litigation casebook authored by Dean Nagy
- Wrote a memo regarding the applicability of insider trading law to crypto assets

Burr & Forman — Birmingham, AL
Summer Associate — Summer 2022

- Drafted articles of incorporation and by-laws for a non-profit organization
- Researched the effect of odometer fraud on a retail installment contract
- Drafted an operating agreement for a limited liability company
- Prepared a memo regarding cost-shifting the costs of a subpoena for an interested non-party

Autocar, LLC — Birmingham, AL
Legal Intern — Summer 2021

- Reviewed trademark guidelines for the company's marketing team and suggested revisions
- Researched regulations and prepared a memo regarding the use of medium and heavy-duty electric trucks
- Prepared a memo regarding the applicability of franchise law in New Jersey to an Autocar distributor

Indiana University Maurer School of Law — Bloomington, IN
Dean's Bicentennial Research Assistant — Summer 2020

- Researched Maurer School of Law alumni and coordinated alumni interviews with fellow research assistants
- Created reports on the alumni's careers and advice they shared for incoming law students

Herculeze Technologies Inc. — Rochester, MI
Operations Manager — Spring 2019-Summer 2020

- Launched peer-to-peer local delivery website that gained 200+ driver and customer signups in its first month
- Cultivated partnerships with local businesses by meeting with companies such as Mattress To Go
- Generated over $5,000 in revenue during the website's first three months
- Delivered a business pitch to a group of 100+ members of the Metro Detroit business community

INTERESTS

- Detroit Lions, Major League Baseball, weightlifting, classic rock

June 25, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am General Counsel of GVW Group, LLC, a privately held group of affiliated businesses operating in the heavy duty truck manufacturing, aftermarket parts distribution, engineering and IT industries.

Ryan was an intern for our Legal team over Summer 2021, after his first year of law school, at our primary manufacturing operating company, Autocar, based in Birmingham Alabama. We have a small legal team that serves the affiliated companies' legal needs, which cover a broad range of disciplines.

Ryan was given a number of widely varying assignments intended both to allow him to see and experience varied challenges within our businesses, and to address questions or issues that were indeed highly relevant and important.

Notwithstanding our limited resources and training capabilities, Ryan demonstrated strong ability to understand issues and identify key questions. He created work product efficiently that reflected sound analyses, and communicated clearly findings, recommendations and open issues. To the extent we saw opportunities to coach, and allow Ryan to refine or follow-up on questions, Ryan eagerly sought and accepted guidance to provide the best and most responsive counsel and support.

Our Legal team thoroughly enjoyed working with Ryan, and we found him to be personable and supportive of our efforts in serving our internal clients.

In my opinion, Ryan should be given every consideration for a clerkship, or for any other opportunities.

Sincerely,
Jeffrey Leeb

Jeff Leeb - jleeb@gvwgroup.com

June 25, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I write to recommend Ryan Tsivitse for a clerkship in your chambers.

Ryan was my student last semester in a small-enrollment course on constitutional history and theory. The reading assignments proved challenging for many students in the course. But the first essay that Ryan submitted for the course— and that I graded blind-- put him in a class by himself from the outset. In my marginal comments I remarked repeatedly on how insightful I found his understanding-- of a notoriously difficult scholarly article, I might add.

I was so impressed with what Ryan had to say, and with how well he said it, that in short order I found myself relying on him to help direct and moderate our round-table classroom discussions. In the class there were some of our most accomplished students in the Class of '23; but Ryan proved unique in helping me to make the most out of our discussions. Not only did he have an unusually good grasp of my own purposes for the course, he also seemed to be the best student in the room when it came to drawing the best out of others.

It is indeed both Ryan's insightfulness and his talent for working with others that led me to urge him to apply for a judicial clerkship.

He is, in fact, such an unusually gratifying student to work with that this past summer I have remained in contact with him— most particularly to trade thoughts on what makes for good legal writing. He is partial to lucidity and precision, while I, as a an academic for decades now, am inclined to write with a complexity that, I grant and intend, makes a reader work hard to get the rewards that I think I am offering my reader. In other words, I have found— in the classroom and in blindly graded work product -- that the way Ryan thinks and writes is a good influence on me; and I enjoy learning from him. Rare is the student about whom I say any such thing.

Thus, I commend to you Ryan as a skilled assistant and also a worthy collaborator— just the thing for the distinctive workplace that is a judge's chambers.

Yours truly,

Stephen A. Conrad
Ph.D., J.D. Professor of Law
IU Maurer School of Law
Bloomington, IN 47405

June 25, 2023

The Honorable Bess Creswell
Frank M. Johnson, Jr. United States Courthouse
One Church Street, Room 401-C
Montgomery, AL 36104

Dear Judge Creswell:

I am delighted to write in support of Ryan Tsivitse's application to be your law clerk for the 2023-24 term. I had the pleasure of teaching Ryan last year in two of my courses here at Indiana University Maurer School of Law: my Fall 2021 Corporate Law Seminar—Insider Trading and Securities Market Abuses and my Spring 2022 course in Securities Regulation. Ryan also worked for me this summer as a research assistant. I therefore stand well positioned to provide this wholehearted recommendation.

Ryan was an excellent student and earned A grades in my seminar and my Securities Regulation course. Although the subject matters were closely linked, the two courses provide students with the opportunity to develop and demonstrate quite different skills, and Ryan's performance in both impressed me greatly.

In the seminar, Ryan contributed a thoroughly researched, thoughtfully organized, and very well-written paper, and he generated lively and productive class discussion during his paper presentation. His paper explored how members of Congress who are suspected of insider trading based on confidential government information can use the Speech or Debate Clause of the U.S. Constitution to effectively preclude investigation and prosecution by the Securities and Exchange Commission or the Department of Justice. But what distinguished Ryan's seminar paper from most of those by his classmates was that he also proposed an original solution to the problem he highlighted: he suggested that as a lesser intrusive alternative to current legislative proposals that would ban outright the ownership of stock in publicly traded companies by Senators and Representatives, Congress should seek from its members who wished to continue owning and trading such stock a limited speech or debate privilege waiver that would extend only to SEC or DOJ investigations and prosecutions related to their personal stock trading. I very much enjoyed working with Ryan on this creative project and found him to be a student with high standards for his written work as well as appreciative of and responsive to my suggestions.

Ryan was also among my top students in Securities Regulation. He was a frequent and engaging participant in class discussions, and his incisive questions and comments contributed greatly to the course's overall success. Ryan's final examination, like his in-class performance, demonstrated a strong command of the complicated federal securities law statutes and rules. It also reflected the clear thinking and analytical reasoning that is necessary for successful problem-solving.

Ryan's work as my summer research assistant was likewise consistently excellent. He cheerfully assisted with proofreading and cite-checking several chapters of the manuscript for the new edition of my Securities Litigation casebook, which demanded careful attention to detail under tight deadlines. In addition, with minimal guidance or effort on my part, Ryan prepared a truly useful memorandum on recent SEC and DOJ enforcement actions involving insider trading in crypto-assets. As with his seminar paper, Ryan's memo reflected rigorous research, sound judgment in providing context without overloading on details, and top-notch writing skills.

For all of these reasons, I believe that Ryan would excel as your law clerk. He would work incredibly hard to meet and exceed your expectations, and your chambers would benefit from his dedication, intelligence, energy, and enthusiasm. If I may be of any further assistance in your evaluation of Ryan's application, please do not hesitate to contact me. I can be reached at 812-856-2826 or dnagy@indiana.edu.

Sincerely,

Donna M. Nagy
Acting Executive Associate Dean and
C. Ben Dutton Professor of Business Law
IU Maurer School of Law

Ryan Tsivitse

250 S. Washington • Bloomington, IN 47408 • (248) 568-3183 • rptsivit@iu.edu

Writing Sample

The attached writing sample is an objective research memorandum written during my time as a summer associate at Burr & Forman. The memorandum addresses the issue of whether courts will cost-shift the costs of complying with a subpoena for an interested non-party. Although benefiting from comments from my mentor, this writing sample represents my original work.

MEMORANDUM

To: **Law Firm Partner**

From: **Ryan Tsivitse**

Date: **June 17, 2022**

Re: **Cost-shifting the costs of a subpoena for an interested non-party in a Chapter 7 bankruptcy**

Issue: Will courts cost-shift the costs of complying with a subpoena for an interested non-party?

Federal Rule of Civil Procedure 45(d)(1) protects non-parties who are subpoenaed from the undue burden and expense of complying with the subpoena.[1] The Rule imposes a duty on the party requesting a third-party subpoena to take reasonable steps to avoid imposing undue burden and expense on the party subject to the subpoena.[2] In a cost-shifting inquiry, courts will consider whether the subpoena imposes expenses on the non-party and whether those expenses are significant.[3]

Courts have historically considered seven factors when deciding whether to shift costs.[4] The non-party's interest in the outcome of the case, the ability of the parties to bear the costs, the public importance of the litigation, the scope of discovery, the invasiveness of the request, the extent to which the producing party must separate responsive information from privileged or irrelevant material, and

[1] *See* F.R.C.P. 45(d)(1); *see also* In re: Blue Cross Blue Shield Antitrust Litig., No. 2:13-cv-20000-RDP, 2018 WL 11425554, at *2 (N.D. Ala. Oct. 24, 2018).
[2] F.R.C.P. 45(d)(1).
[3] United States v. McGraw-Hill Companies, 302 F.R.D. 532, 534 (C.D. Cal. 2014).
[4] *See id.*

the reasonableness of the costs of production were all factors that courts considered prior to a 1991 amendment to Rule 45 of the Federal Rules of Civil Procedure.[5]

Following the amendment of Rule 45 in 1991, the cost-shifting inquiry shifted to whether or not the non-party faced a significant expense.[6] The Ninth Circuit held that the only consideration is whether the subpoena imposes significant expense on the non-party.[7] The D.C. Circuit court held that the amendment to Rule 45 requires cost-shifting in all instances in which a non-party incurs a significant expense that results from compliance, and that the party seeking discovery should bear at least enough of the cost of compliance to render the remaining expense non-significant.[8]

Courts will only shift costs that result from complying with the subpoena.[9] Expenses that are not caused by compliance or that do not result from compliance with the subpoena are not compensable.[10]

For many courts, only reasonable expenses are compensable.[11] An unreasonable expense is one that does not result from complying with the subpoena.[12] Unnecessary or excessively expensive costs that are incurred in complying with the subpoena will also be considered unreasonable.[13] What is

[5] *See id.*
[6] *See* Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013).
[7] *See id.*
[8] Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001).
[9] *See* In re: Blue Cross Blue Shield Antitrust Litig. at *2.
[10] *See id.*
[11] *See* G&E Real Estate, Inc. v. Avison Young–Washington, D.C., LLC, 317 F.R.D. 313, 316 (D.D.C. 2016).
[12] *See id.*
[13] *See* In re: Blue Cross Blue Shield Antitrust Litig. at *3.

considered reasonable is determined by the discretion of a trial court.[14] A non-party who moves for costs and fees bears the burden of demonstrating that the costs and fees are reasonable.[15]

In determining whether an expense is "significant," a court may consider the non-party's ability to bear the costs of producing the subpoena.[16] An expense that is considered significant for a small business would likely be considered insignificant for a global financial institution.[17]

Courts may require non-parties to bear some or all of the expenses where the particular equities of the case demand it.[18] In determining whether a non-party should bear the costs, courts consider the factors of "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public importance."[19] Although these factors predate the 1991 amendment to Rule 45, at least one court has stated that the amendment does not overturn prior case law in which these factors were considered.[20]

Regarding a party having an interest in the outcome of the case, in *In re Exxon Valdez*, the court determined that a non-party that relied on a defendant for

[14] *See id.*
[15] S*ee id.*
[16] *See* McGraw-Hill Companies, Inc. at 536.
[17] *See id.*
[18] *See* Wells Fargo Bank, N.A. v. Konover, 259 F.R.D. 206, 207 (D. Conn. 2009).
[19] Linder v. Calero-Portocarrero, 180 F.R.D. 168, 177 (D.D.C. 1998).
[20] *See supra* note 3.

29% of its income weakened its claim that it was a neutral party.[21] In another case, a non-party that was substantially involved in the underlying transaction and could have anticipated that the failed transaction could result in litigation was also considered to not be a neutral non-party.[22] Courts also view non-parties involved in litigation arising out of the same facts as the litigation that they are a non-party to as not neutral parties for the purposes of awarding costs.[23] An interested party will more likely have to bear the costs of complying with the subpoena.[24]

Regarding bearing the costs of compliance, a court determined that a non-party with gross receipts of $58 million and a net worth of $17 million meant that it could readily bear the costs of compliance.[25] Another court determined that a non-party could bear the costs of compliance because it had received $700,000 in contributions.[26] In one case in which both the defendant and the non-party were large corporations with resources to bear the costs of compliance, the non-party was not considered to be more readily able to bear the costs of the subpoena.[27] The greater the ability of the non-party to bear the costs of compliance, the more likely it will have to bear the costs of compliance.[28]

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[21] In re Exxon Valdez, 142 F.R.D. 380, 384 (D.D.C. 1992).
[22] In re First American Corp., 184 F.R.D. 234, 242 (S.D.N.Y. 1998).
[23] *See id.*
[24] *See supra* note 21.
[25] *See id.*
[26] *See* Stormans, Inc. v. Selecky, No. C07–5374 RBL, 2015 WL 224914, at *7 (W.D. Wash. Jan. 15, 2015).
[27] *See* In re: Blue Cross Blue Shield Antitrust Litig. at *8.
[28] *See supra* note 21.

Finally, regarding the litigation being of public importance, one court determined that an action that involved bank fraud was considered one of public importance.[29] A case involving a widely-publicized oil spill was also found to be of public importance.[30] If a matter is found to be of public importance, it is more likely that the non-party will have to bear the costs of compliance.[31]

If the client wants to shift the costs of complying with the subpoena, it will likely need to show that the costs it faces are significant. The client will need to show that it faces significant expenses that result from complying with the subpoena, and that its expenses are reasonable. If the client can show that the expenses it faces are significant, it should be compensated for the expenses that are considered significant.

It might be determined that the costs to the client are not significant, and that it has to bear the costs of compliance. However, the client can argue that that party requesting the documents could more easily bear the costs of complying with the subpoena.

If a court decides to balance the equities to determine who should bear costs, the client will have to show that it does not meet the three factors of the balance the equities test. Although the client is an interested party, the client can argue that opposing party is better situated to financially handle the cost of the subpoena, and

[29] *See supra* note 22.
[30] *See* In re Exxon Valdez at 381.
[31] *See* Behrend v. Comcast Corp., 248 F.R.D. 84, 86 (D. Mass. 2008).

that similar to the non-party in the *In re Exxon Valdez* case, it is being subpoenaed by a party that is better situated to handle the costs of the subpoena.

The client can also argue that the dispute that the client is involved in is not one of public importance, which means that the client should not have to bear the costs of compliance.

Based on the facts at issue, the client will likely have to bear the costs of compliance. However, if the costs of compliance are significant, the client should argue that it should not bear the costs of complying. If the court decides to balance the equities, the client should argue that the opposing party is better situated to handle the costs of compliance and that the dispute is not one of public importance, which means that it should not have to pay the costs of complying with the subpoena.